(18,411.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 247.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND JOHN H. JOHNSON, SHERIFF AND *EX OFFICIO* TREASURER OF WILKES COUNTY,

vs.

W. N. COLER & COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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a *Certified Transcript of Record.*

United States Circuit Court of Appeals, Fourth Circuit.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY ET AL., Appellants,
versus
W. N. COLER & COMPANY, Appellees.
} No. 319.

Appeal from the circuit court of the United States for the western district of North Carolina, at Greensboro.

Record filed June 30th, 1899.
Clerk's office, U. S. circuit court of appeals, fourth circuit. H. T. Meloney, clerk, Richmond.

1 *Transcript of Record.*

UNITED STATES OF AMERICA, *Western District of North Carolina,* } *To wit:*

At a circuit court of the United States for the western district of North Carolina, begun and held at the court-house, in the city of Greensboro, on the first Monday of April, being the 3rd day of the same month, in the year of our Lord one thousand eight hundred and ninety-nine.

Present: The Honorable Thomas R. Purnell, United States district judge of the eastern district of North Carolina, presiding and holding said court under provisions of section 603 of the Revised Statutes of United States.

Among others were the following proceedings, to wit:

THE BOARD OF COMMISSIONERS OF WILKES County and Others
versus
W. N. COLER and Others, Bankers, under the Firm Name and Style of W. N. Coler & Co.
No. 145. Equity.

Bill of Complaint.

UNITED STATES OF AMERICA,
Western District of North Carolina.

In the United States Circuit Court.

W. N. COLER, W. N. COLER, JR., BIRD S. COLER, JAMES W. Campbell, and Francis W. Coler, Bankers, under the Name and Style of W. N. Coler and Company, Complainants,
vs.
THE BOARD OF COMMISSIONERS OF WILKES COUNTY and Clarence Call, ex-Sheriff and *ex Officio* ex-Treasurer, and John H. Johnson, Sheriff and *ex Officio* Treasurer of Wilkes County, Respondents.
In Equity.

Bill.

To the honorable the judges of the circuit court of the United States, sitting in equity:

2 The complainants, W. N. Coler, W. N. Coler, Jr., Bird S. Coler, James W. Campbell, and Francis W. Coler, are each and every one, a citizen, and resident of the State of New York, and are bankers, under the name and style of W. N. Coler and Company; and the said complainants bring this their bill of complaint against the Board of Commissioners of Wilkes County, each and every member of said board being a citizen and resident of the State of North Carolina, and of the county of Wilkes, and within the western district of North Carolina; and, also bring this, their bill of complaint, against Clarence Call, ex-sheriff and ex-treasurer of Wilkes county, and also, against John H. Johnson, sheriff and *ex officio* treasurer of Wilkes county, within said district; and thereupon, your orators, complain and say:

1. That the matter in dispute exceeds, exclusive of interest and costs, the sum and value of two thousand dollars, this suit being to recover from the respondents, the sum of four thousand and two hundred dollars ($4,200.00) and to enjoin the respondents, from paying out, or in any manner disposing of, or interfering with, a sum of money, to wit: thirteen thousand dollars ($13,000.00), held by respondents, Clarence Call and John H. Johnson, sheriffs, and *ex officio* treasurers, as above set out, the said sum being amount due holders of coupons, interest on certain bonds, hereinafter mentioned, other than is directed by this court, the said sum of forty-two hundred dollars ($4,200.00) being due upon the coupons held by the

complainants, the said coupons being the obligations of the said county, to pay the complainants, said amount.

2. That your orators, under the firm name of W. N. Coler & Company, are engaged in the banking business in the city and State of New York, and as such, are buyers and sellers of municipal bonds.

3 That, as such, your orators bought, for valuable consideration, and for a large sum, the highest market price, a great number of bonds, to wit: fifty-five (55) county bonds of the denomination of one thousand dollars each, bearing interest, at the rate of six per centum, payable on the 1st day of April and 1st day of October, in each and every year. That the purchase of said bonds, was for value, in good faith, and without notice, express or implied, that there was any suggestion of their being void, invalid, fraudulent, or otherwise than perfectly legal, in their issue and sale.

4. That the total issue of bonds by the said county in pursuance of the authority and power conferred upon the board of com-
3 missioners of the same, and in pursuance of which power, the said bonds held by complainants were issued, as aforesaid, was in the amount of one hundred thousand dollars ($100,000), all of which bonds, as complainants are informed and believe, were sold, as aforesaid, and are owned, and have been in possession of *bona fide* holders, for value, without notice, and the interest on the same has been paid regularly at the times set out in this bill, for seven years, as complainants are informed and believe, the said bonds having been issued in the year 1889.

That a levy upon the property of the tax-payers of the county has been made, and the interest collected by the sheriff of the said county of Wilkes for each and every year, for eight years, as complainants, your orators, are informed and believe.

5. That the interest due and payable, as aforesaid, on about the first of April and October of each and every year, upon the bonds, held by complainants, as herein set out, is evidenced by certain coupons attached to said bonds, as follows, to wit:

2 coupons due April, 1896, from bonds Nos. 73 and 84....	$60 00
60 coupons due April, 1898, from bonds Nos. 4, 8, 9, 11, 13, 28, 51, 33, 37, 39, 43, 49, 56, 59, 63, 76, 78, 81, 83, 84, 86, 90.....	1,800 00
48 coupons due October, 1898, from bonds Nos. 4, 11, 13, 15, 17, 19, 21, 24, 28, 31, 33, 37, 43, 48, 56, 59, 63, 69, 72, 74, 76, 78, 81, 83, 85, 86, 88, 90.....	1,440 00
	$3,300 00

and the said sum is the interest due and still unpaid upon the bonds issued and purchased by your orators, complainants in this bill; and also the sum of nine hundred dollars, evidenced by other coupons in the hands of your orators and owned by them, the same attached to the said bonds. That the above sum your orators have demanded of respondents by presenting the said coupons, as has

heretofore been done, when payment was made, at the fourteen times, as aforesaid.

6. That, although the said sum of thirteen thousand dollars, collected from the tax-payers of the said county, by reason of a levy made by the board of commissioners, in pursuance of the power conferred upon the same, is in the hands of the said respondents, the said sheriffs, *ex officio* treasurers of the said county of Wilkes, for the purpose of paying the said interest, due and payable
4 on the 1st of April, 1896, on the 1st of April, 1898, and on the 1st of October, 1898, they, the said respondents, refuse to pay the same to the holders of the said coupons, your orators and complainants. That having received the said amount, for the purpose aforesaid, and only for that purpose, they, the said sheriffs, *ex officio* treasurers, and the respondent, the board of commissioners, under and by virtue of whose orders the said treasurers hold the said amount, have become trustees of the bond and coupon holders, between whom—your orators and them—there exists a relation fiduciary in its character, they, the said respondents, holding the said sum, for the use of, and in trust for, your orators, complainants, and for other bondholders, whoever, and wherever they are, or may be.

7. That as your orators are informed and believe, the reason the said *ex officio* treasurers of the county of Wilkes, have not accounted with complainants, as under the rules of equity and good conscience they are required to do, being, as they are, trustees, as aforesaid, is the fact, that the said board of commissioners, or its predecessors—the board of commissioners being a continuous body—sued out a certain process of injunction from one of the superior courts of North Carolina, within said western district, and caused the same to be served upon them, or the one of the said *ex officio* treasurers, holding the said sum, enjoining them, from accounting with the holders of any of the said bonds and coupons, and from paying over to them the interest due as aforesaid, which interest the board of commissioners has caused to be paid into the hands of the said *ex officio* treasurers, and to be held by them for the sole purpose of the payment of the said interest, due and payable as hereinbefore set forth.

8. That the proceedings in the said superior court of North Carolina, it being for the county of Wilkes, in which, this injunction was obtained, was begun in the name of the board of commissioners of said county, and, in the name of one C. C. Wright, an alleged tax-payer, as plaintiffs, against Clarence Call, sheriff, and *ex officio* treasurer of the county, as defendant, on the 23rd day of December, 1897. That the complainants, your orators, were not made parties to the same, nor was any other *bona fide* bondholder, made a party, as your orators are informed and believe. And your orators do further say, as they are advised and believe, that they, as such bondholders, are in no manner affected by the judgment or decree of the said State superior court, which granted the injunction, as aforesaid.

5 9. Your orators do further say that this proceeding in the State court was taken and commenced eight years after the

issue of these said bonds, and purchase of the same, by complainants, your orators; and, as they are informed and believe, for the purpose of repudiating the honest debt of the county, contracted and made in good faith, by the said county, which received full value and consideration for the same. That, as your orators are informed and believe, the said respondents, the board of commissioners, purposely avoided making the bondholders, your orators, or any other bondholders, parties defendants in the State court proceeding, to prevent a removal of the suit to the jurisdiction of this, the circuit court of the United States.

10. That, on the 18th day of February, 1898, the judge of the State supreme court, signed an injunction order, "that that defendant, Clarence Call, sheriff, of Wilkes county, be, and he is hereby, enjoined, and restrained," from paying any portion of the moneys in his hands, to the coupon-holders, in discharge of the interest due and payable, as aforesaid.

11. That the defendant in the said proceeding, Clarence Call, excepted to the order of the said superior court, and appealed to the supreme court of North Carolina, from the same.

12. That, after the said order of injunction was issued, in the said State court, and after the appeal was taken by the said Clarence Call, sheriff, and *ex officio* treasurer, on motion of counsel for J. M. Turner, and J. M. Wellborn, and by consent of the plaintiffs, the said Turner and Wellborn, as the alleged owners of one of the bonds of the county of Wilkes, were allowed to make themselves parties to the said proceeding, as defendants.

13. That, on the 8th day of March, and after the time had expired within which, the said defendant, Clarence Call, sheriff, was allowed to serve his statement of case, on appeal, to the supreme court of North Carolina, the said Turner and Wellborn filed an answer, in the said proceeding, asking that their rights as bondholders, be adjudicated.

14. That, on the 22nd day of March, 1898, on motion of counsel for plaintiffs in the said proceeding, the said superior court adjudged that the bonds were void, the board of commissioners, not having the power to issue the same.

15. That, on the 9th day of November, 1898, the supreme court of North Carolina, affirmed the judgment of the said superior court.

6 16. That the said proceeding, in the State court, in which the said order of injunction was issued, was purely an *ex parte*, collusive one, as your orators are informed, advised and believe, it being, in the first instance, an action by a principal to prevent an agent from doing a thing which the latter could not do, without the order of the former. The said sheriff and *ex officio* treasurer is under the control of the county commissioners, as is prescribed in the Code of North Carolina and could not pay money out, except by order of the board. That in this proceeding in the State court there were no adverse parties, and there could, under the laws of the State, be no action such as would authorize any court of the State, in the exercise of its jurisdiction, to take cognizance of.

16. That said Turner and Wellborn, as complainants are informed and believe, were no- adverse parties in this proceeding, but were made parties defendants by the court, and at the instance of the plaintiffs in the same. That as the complainants, your orators, are further informed and believe, they do not own the said bond-, as alleged in their answer, filed in the State court, but obtained the same for the purpose of becoming parties to the proceeding, and, to the end, that they might aid the plaintiffs in their effort to effect a repudiation of the said county bonds. That they avow, even now, as your orators are informed and believe, their purpose was, and is, to have these bonds declared null and void. That they did not appear in the supreme court, by counsel or otherwise, at the hearing of the appeal; nor did the defendant, Call, appear in said court. That, as your orators are informed and believe, the expenses incurred by the said Turner and Wellborn, in becoming parties to the said proceeding, have been paid by the commissioners for the county, and, although the defendants in the supreme court of the State, were adjudged to pay the costs of the proceeding, and execution for the same was issued against the said Turner and Wellborn, and their sureties on their appeal bond, yet, the same was paid by order of the county commissioners out of the funds of the county, in the sum of $24.30.

17. That, as your orators are further informed and believe, the said Turner and Wellborn have sued out a writ of error to *to* the Supreme Court of the United States, ostensibly for the purpose of reversing the judgment of the supreme court of North Carolina, in this proceeding, when really it is for the purpose, and to the end, that the decree of this court, in this suit, now begun by your
7 orators, may be anticipated. That, as your orators *and* informed and believed, the commissioners of the said county of Wilkes have agreed to pay the expenses, costs, &c., of suing out the said writ of error out of the county funds.

18. That your orators, complainants, are advised, and believe that there is no Federal question involved in the proceeding in the State court, and, upon inspection of the record in the same by the Supreme Court of the United States, the said writ of error will be dismissed.

19. That the Northwestern North Carolina Railroad Company, was chartered, by an ordinance of the constitutional convention of North Carolina, ratified the 8th of March, 1868, and published as chapter 17 of the ordinances of said convention. A copy of said ordinance is hereto attached, marked Exhibit A.

20. That, by virtue of said ordinance, the Northwestern North Carolina Railroad Company, was organized, on April 17th, 1868.

21. That your orators are advised and believe that the bonds in the sum of one hundred thousand dollars, issued by the board of commissioners of Wilkes county, as set out in this bill, were legally issued, and authorized, by the original charter, granted by the convention in 1868, and by an act of assembly of the 11th of August, 1868, which is in the following words: "Section 1 The General Assembly of North Carolina do enact that an ordinance entitled, 'An

ordinance to incorporate the Northwestern North Carolina Railroad Company,' ratified the 9th day of March, A. D. 1868, be and the same is, hereby re-enacted, ratified and confirmed:" and also, by sections, 1896 and 1897 of the Code of North Carolina: and also, by an act of the General Assembly of North Carolina ratified 20th day of February A. D. 1879, entitled an "Act to amend the charter of the Northwestern North Carolina railroad, for the construction of a second division from the towns of Winston and Salem, in Forsyth county, up the Yadkin valley, by Wilkesboro, to Patterson's factory, Caldwell county." Also by act of March 2nd, 1881, Exhibit G, hereto attached. Copies of these acts and sections of the code, are attached hereto, and marked B, C, D and E.

22. That the county of Wilkes, acting through its board of commissioners, and in accordance with the ordinance and acts, as above set out, subscribed the sum of one hundred thousand dollars to the capital stock of the Northwestern North Carolina Railroad Company, the proposition to subscribe the said amount having
8 been submitted to the qualified voters of the county, at an election held according to law, and a large majority of the said qualified voters, having voted in favor of the same.

23. That in return for, and in consideration of, said subscription, the said Northwestern North Carolina Railroad Company issued to the county of Wilkes, stock in, and to, the amount of one hundred thousand dollars, which stock the said county now holds, as your orators are informed and believe, and has held, since the issue of the said bonds, in the year 1889. That the said county, by reason of the holding of the said stock, has been represented on the board of directors of the said company, and continued to be until the said sale of the road was made, by decree of this court, in 1894. That the county of Wilkes long desired the completion of this railroad, and by reason of the same, has received great benefit, in the increased value of the lands of the county, and transportation facilities, for freight and passengers. That this railroad is the only one running within the limits of the county, and has been taxed by the county, each and every year since its construction.

24. That the said bonds, hereinbefore *delivered* and set out, were issued to the corporation by the said county on or about October 1st, 1889, in payment of the said subscription. A copy of the bond is hereto attached, it being one of the series issued, and is marked F.

25. That after the issue of the said bonds to the Northwestern North Carolina Railroad Company, they were duly exposed to sale, by said company, and your orators bought, as hereinbefore set out, those which they now hold, paying for them a large sum of money, the highest market price.

25a. That the validity of the bonds of the county of Forsyth, similar to the said bonds of the county of Wilkes, issued under the ordinance of the convention of 1868, has been upheld, by the supreme court of North Carolina in two cases, to wit: Hill *vs.* Commissioners of Forsyth County, 67 N. Car. R., 367, and Belo *vs.* Commissioners, &c., 76 North Carolina Rep., 489. That this ordinance

of the convention of 1868, is the one, incorporating the Northwestern North Carolina Railroad Company.

That the complainants, your orators, purchased these bonds, relying upon their being legal and valid obligations of the county of Wilkes; that, at the time of their issue and purchase, these bonds, and like bonds of other counties, were regarded and treated
9 as valid securities by the corporate authorities of the county of Wilkes, and other counties of the State; that they were so regarded and treated by the public, by the legal profession, and by the legislative, executive and judicial departments of the State. That the decisions of the supreme court of the State before, at the time of, and since, the issue of the said bonds, until 1897, appear to have assumed the validity of these bonds. That there was in North Carolina, a settled course of decisions of the court from 1870 to 1897, construing the constitution and statutes of the State, in favor of the validity of these bonds and like bonds. That there was an action begun in the county of Wilkes some years ago, as your orators are informed and believe, for the purpose of invalidating these bonds, and abandoned. That there never has been a pretense on the part of any one that these bonds were not issued in good faith, and that the county of Wilkes did not receive full value in return for same.

26. That the sheriff of the county of Wilkes, and *ex officio* treasurer, and ex-sheriff and *ex officio* ex-treasurer of the said county, and board of commissioners are, as your orators are advised, contending with one another for the possession of this sum of money, to wit: thirteen thousand dollars, which is in the hands now of the ex-sheriff, Clarence Call and John H. Johnson, sheriff and treasurer; and, unless restrained by the order and decree of this court, will make away with, or dispose of, the said sum, as your orators are advised, having refused to pay over the same, as received, and by such refusal, the said parties, respondents, have committed a breach of the trust reposed in them, and ignored their obligations, as hereinbefore set out. The amount due your orators is defined, set apart, and an acknowledged debt, in its nature accompanied by a right to the appropriation of the said sum, in the hands of the respondents, for its payment, your orators having an interest in the said sum and a lien thereon, under the conditions hereinbefore recited.

27. That, as advised, your orators say they are entitled to have an account stated between them and the respondents, to ascertain the condition of the sum held by respondents for them; and to ascertain what they are to receive upon their coupons; and they are further advised that, according to the rules of this court, they are entitled to have an injunction upon the said respondents against disposing of the said *said* sum, or any part of the same, in any other manner, than under the decree of this court; and, further, to have a receiver appointed to hold the said sum, as the agent and officer of this court.

10 Wherefore, the premises considered, your orators pray:

1. That this honorable court enter a decree compelling the taking and statement of an account as set out in this bill; that an

injunction, issue, upon the respondents, as set out in the bill, also; and that a receiver be appointed as set out therein.

2. That, if, in the opinion of this court, after reading the foregoing bill it shall be deemed advisable to do so, notice be issued to J. M. Turner and J. M. Wellborn to show cause why they should not be made parties to this suit, and requiring them to answer on oath as to the truth of the allegations and charges made against them in this bill.

3. That, if, in the opinion of this court, it shall be deemed advisable, notice be issued to all bondholders having an interest in the said sum to appear and file with the master, the receiver, their coupons, to the end that their rights may be ascertained, and amounts due them stated in the account, to be taken.

4. That not only a writ *of injunction*, conformably to the prayer of this bill be issued, and receiver be appointed, but, also, a writ of subpœna of the United States of America, directed to the Board of Commissioners of Wilkes County and Clarence Coll, ex-sheriff and ex-treasurer, and John H. Johnson, sheriff and treasurer of said county, commanding them on a certain day to appear and answer unto this bill of complaint, and to abide and perform such order and decree in the premises as to the court shall seem proper, and required by the principles of equity and good conscience.

5. That, if in anything your orators are mistaken in the relief prayed for, then they pray for all such other, further and general relief as the premises may warrant, and the rules of equity allow.

W. N. COLER & COMPANY,
By CHARLES PRICE, *Solicitor.*

This day comes Charles Price, who makes oath that he is the agent and attorney of the complainants, all of whom reside in the State and city of New York, and are absent from the western district of North Carolina; that, owing to their absence they are not able to make the verification of this bill; that the same is founded upon written instruments in the hands of this affiant for the
11 payment of money only: and, further, that the bill of complaint is true, except as to matters stated on information and belief, and as to those matters he believes it to be true.

CHARLES PRICE.

Sworn to and subscribed before me this 22nd day of February, 1899.

[SEAL.]

McLAIN PLEASANTS,
U. S. Com., East. Dist. Va.

United States Circuit Court, Western District of North Carolina.

W. N. COLER AND COMPANY, Complainants,
vs.
THE BOARD OF COMMISSIONERS OF WILKES COUNTY, NORTH Carolina, and Clarence Call, ex-Treasurer, and John H. Johnson, Treasurer of Wilkes County.

On reading the verified bill in the above-entitled suit and exhibits, filed as a part thereof, it is ordered that the complainants' motion for injunction and receiver, &c., pursuant to the prayer of the bill, be set down for hearing at 12 o'clock m., before the circuit court of the United States, at Asheville, North Carolina, on the 8th day of March, 1899, or as soon thereafter as counsel can be heard. This being a proper case for granting a temporary restraining order, it is ordered and decreed that until the hearing of such motion for injunction and receiver, &c., and the further order of the court thereon, the respondents, The Board of Commissioners of Wilkes County, and Clarence Call, ex-sheriff and ex-treasurer, and John H. Johnson, sheriff and treasurer of said county, are restrained and prohibited from making way with, disposing of, or in any manner interfering with the sum of money, to wit: thirteen thousand dollars, or any part of the same, which may be in their hands or in the hands of any one of them, as alleged in the bill.

It is further ordered that a certified copy of this order be served upon the respondents, by reading and delivering a copy thereof.

It is further ordered that subpœnas issue to the respondents as prayed for in the bill.

NATHAN GOFF,
U. S. Circuit Judge.

Feb'y 22, 1899.

12 EXHIBIT "A."

CHAPTER XVII.

An ordinance to incorporate the Northwestern North Carolina Railroad Company.

SECTION 1. Be it ordained by the people of North Carolina in convention assembled, and it is hereby ordained by authority of the same: That for the purpose of constructing a railroad of one or more tracks, from some point on the North Carolina railroad, between the town of Greensboro, in Guilford county, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the State, to be hereafter determined, a company is hereby incorporated under the name and style of the Northwestern North Carolina Railroad Company, with a capital stock of two millions of dollars, which shall have a corporate existence as a body politic, for the space of ninety-nine years, and by that name may sue and be sued, plead and be impleaded, in any court of law and equity in

the State of North Carolina; and may have and use a common seal, and shall be capable in law and equity of purchasing, holding, leasing and conveying estates, real and personal, and mixed, and acquiring the same by gift or devise, so far as may be necessary for the objects herein contemplated, and no further; and said company may enjoy all other rights and immunities which other corporate bodies may lawfully exercise, and may make all necessary by-laws and regulations for its government not inconsistent with the constitution and laws of the State of North Carolina and of the United States.

SEC. 2. Be it further ordained, That the capital stock of said company may be created by subscriptions on the part of individuals, corporations and counties, in shares of one hundred dollars.

SEC. 3. Be it further ordained, That books of subscription to the capital stock of said company shall be opened by the following commissioners, to wit: I. G. Lash, J. A. Vogler, H. W. Fries, in the town of Salem; and Thomas J. Wilson, Joseph Masten, R. A. Wilson, in the town of Winston, and by such other persons and in such other places as the aforesaid commissioners may direct; and that ten days' notice of the opening of said books shall be given in one or more newspapers of this State; and, furthermore, that the said commissioners, or any four of them, may, at any time after said
13 books have been kept open for the space of thirty days, and the sum of thirty thousand dollars has been subscribed to the capital stock of said company and five per cent. paid thereon, have power to call together the subscribers to said stock for the purpose of completing the organization of said company; and the said subscribers shall be and are hereby declared incorporated into a company by the name and style of the Northwestern North Carolina Railroad Company; and the said company may, from time to time, receive other subscriptions to its capital stock as it may deem proper.

SEC. 4. Be it further ordained, That the company may hold annual meetings of its stockholders, and oftener if necessary, and at its organization and the annual meetings subsequent thereto, ten directors shall be elected to hold office for one year, or until their successors shall be elected; and any of said meetings shall have power to make or alter the by-laws of the company: Provided, that in all such meetings of the stockholders a majority of all the stock subscribed shall be represented in person or by proxy, which proxy shall be verified in the manner prescribed by the by-laws of the company; and each share thus represented shall be entitled to one vote on all questions; and that it shall be the duty of the directors of the company to elect one of their own number as president of said company, and to fill all vacancies in their board.

SEC. 5. Be it further ordained, That after the organization of said company and the election of the president and other necessary officers, the officers so elected shall proceed, under the advice of the directors, to locate the eastern terminus of the Northwestern North Carolina railroad, and shall proceed to construct said road, with one or more tracks, as speedily as practicable, in sections of five miles each, to the towns of Winston and Salem in Forsyth county, which

portion of said railroad, when completed, shall constitute its first division: Provided, that if the distance from the nearest section to the towns of Winston and Salem be less than five miles, the same shall be considered a section.

SEC. 6. Be it further ordained, That said company shall have the same power to call for and enforce the payment of stock subscribed as was heretofore granted to the North Carolina Railroad Company, by their charter of incorporation; and shall have power to condemn land for the use of the company, when a contract of purchase cannot be made with the owner thereof, to the same extent and in the same manner and under the same rules, regulations and restrictions as the said North Carolina Railroad Company were authorized to do by their act of incorporation.

SEC. 7. Be it further ordained, That all contracts made and entered into by the president or superintendent of the company, whether with or without seal, shall be binding upon the company; and the president shall, under the instruction of the board of directors, issue certificates of stock to the stockholders, which shall be transferable in the manner prescribed by the by-laws of the company.

SEC. 8. Be it further ordained, That whenever the president and chief engineer of said company shall certify to the governor of the State that the grading of any of the sections of said road, as mentioned in section 5 of the ordinance, is completed and ready for the superstructure, he shall direct the public treasurer of the State to loan in behalf of the State to the said company the sum of fifty thousand dollars in coupon bonds; and in like manner the governor will direct similar loans to be made to the company upon the completion of the grading of each and every section, until the first section is graded entire; and said company shall set aside the receipts of the road over and above its annual expenses, as a sinking fund to pay the said debts and interests, the whole amount of said debt and interest to be paid before the said company shall order any dividends on the stock of the company; and that said sinking fund so produced shall be semi-annually paid into the public treasury.

SEC. 9. Be it further ordained, That no part of said loan or bonds shall be delivered to said company until the president and directors thereof shall execute and deliver to the governor of the State a mortgage on the entire road and its property, conditioned to save the State harmless against the loss of both principal and interest of said loan.

SEC. 10. Be it further ordained, That the coupon bonds loaned, as aforesaid, shall be signed by the governor, countersigned by the treasurer and sealed with "the great seal of the State," bearing six per cent. interest, the principal payable at the end of thirty years from the date thereof, and the coupons for the interest payable semi-annually in such form as the public treasurer may direct.

SEC. 11. Be it further ordained, That the company may have the exclusive right of transporting persons and freight upon said road at such rates of charges as the board of directors may fix, and may have power to farm or lease the same to any person or persons or corporation.

SEC. 12. Be it further ordained, That the stockholders of said company may pay the stock subscribed by them either in money, labor or material for constructing said road, as the board of directors may determine, and that all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company, for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company.

SEC. 13. Be it further ordained, That the company shall have power to construct branches of said road, one of which shall run from the towns of Winston and Salem by way of Mount Airy, in Surry county, to the line of the State of Virginia.

SEC. 14. Be it further ordained, That this ordinance shall be in force from and after its passage.

Ratified this 9th day of March, A. D. 1868.

CALVIN J. COWLES, *President.*

T. A. BYRNES, *Secretary.*

EXHIBIT "B."

An act ratifying and confirming the charter of the Northwestern North Carolina Railroad Company.

SECTION 1. The General Assembly of North Carolina do enact that, an ordinance entitled "An ordinance to incorporate the Northwestern North Carolina Railroad Company," ratified the 9th day of March, A. D., 1868, be, and the same is hereby re-enacted, ratified and confirmed, and all acts and things heretofore done under the provisions of said ordinance are hereby ratified and confirmed.

SEC. *3.* That all the rights, powers and authorities conferred or purporting to be conferred by said ordinance incorporating the Northwestern North Carolina Railroad Company on the justices of the peace of Forsyth county, or of the county court of said county be, and the same are hereby conferred on the commissioners of said county.

SEC. 3. That the commissioners of the county of Forsyth
16 are hereby invested with full powers and authority to levy from time to time, such tax as may be sufficient to pay the subscriptions made by said county to the capital stock of the Northwestern North Carolina Railroad Company, and any interest due thereon, or to liquidate any debt created by said county in borrowing money to pay such subscription stock.

Ratified the 11th day of August, A. D., 1868.

EXHIBIT "C."

Section 1996 of the Code of North Carolina.

The boards of commissioners of the several counties shall have power to subscribe stock to any railroad company or companies when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest.

EXHIBIT "D."

Section 1997 of the Code of North Carolina.

The board of commissioners of any county proposing to take stock in any railroad company shall meet and agree upon the amount to be subscribed, and if a majority of the board shall vote for the proposition, this shall be entered upon the record, which shall show the amount proposed to be subscribed, to what company, and whether in bonds, money or other property, and, thereupon, the board shall order an election to be held on a notice of not less than thirty days, for the purpose of voting for or against the proposition to subscribe the amount of stock agreed on by the board of county commissioners. And if a majority of the qualified voters of the county shall vote in favor of the proposition, the board of county commissioners, through their chairman, shall have power to subscribe the amount of stock proposed by them and submitted to the people subject to all the rules, regulations and restrictions of other stockholders in such company or companies. Provided, that the counties, in the manner aforesaid, shall subscribe from time to time such amounts, either in bonds or money as they may think proper.

17 EXHIBIT "E."

CHAPTER 43.

An act to amend the charter of the Northwestern North Carolina railroad for the construction of a Second division from the town- of Winston and Salem, in Forsyth county, up the Yadkin valley by Wilkesboro to Patterson's factory, Caldwell county.

The General Assembly of North Carolina do enact:

SECTION 1. That section thirteen of chapter seventeen of the ordinance of the convention of one thousand eight hundred and sixty-eight, ratified the ninth day of March, one thousand eight hundred and sixty-eight, be amended by adding the words " and one of which shall be constructed from the town- of Winston and Salem, up the valley of the Yadkin by the way of Jonesville and Wilkesboro, in the county of Wilkes, to Patterson's factory, in the county of Caldwell, which branch shall be known as Second division."

SEC. 2. That said ordinance be amended by inserting a new section between sections thirteen and fourteeen, to read as follows: " That the penitentiary board is authorized and directed to farm out to (the) president and directors of said company, for the purpose of constructing the Second division of said road, two hundred able-bodied convicts to work on the construction of said railroad, but the said convicts shall be at all times under the supervision and control, as to their government and discipline, of a supervisor, who shall be appointed by the governor upon the recommendation of said railroad company: Provided, that there shall be an estimate made of the net value of the labor done by said convicts on the road of said

company to be fixed on a just and equitable basis by the president of said company and a person appointed by the governor on the part of the State, and the net value of labor shall be a first lien on all property and franchises of said Second division of said railroad. Provided, further, that the State shall not be at any expense for the feeding, clothing or other care of said convicts."

SEC. 3. Nothing in this act shall be construed to interfere with the convicts assigned to any road in which the State has an interest.

SEC. 4. That any township or city, town, county, or other
18 municipal corporation of this State, shall have power and authority to subscribe for and take any number of shares of capital stock of said company that a majority of the voters of such township or city, town, county or other municipal corporation may elect to take therein. That upon (the) request of twenty resident and tax-payers of any such township or city, town, county, or other municipal corporation of this State, the municipal corporation (and in case of township, the justices of the peace of such township) shall determine the number of shares in the said company proposed to be taken by such township or city, town, county or other municipal corporation, and shall appoint a day on which an election shall be held in such township or city, town, county, or other municipal corporation, in the manner prescribed by law for holding elections, at which election the legally qualified voters of such township or city, town, county, or other municipal corporation, shall be entitled to vote for or against such subscription, the legally qualified voters favoring such subscription to vote ballots written or printed "Railroad," those opposing such subscription to vote "No railroad." The election herein provided for shall be held at the usual voting places for such townships or cities, towns, counties, or other municipal corporations, (and in case of townships, by justices of the peace of such townships) in the same manner that persons are appointed for holding other elections. And the returns thereof shall be made and the result thereof announced as in other elections prescribed by law. Provided, that in case of townships the justices of the peace of such township, for carrying out the purpose of this act shall be vested with all the powers vested in the boards of commissioners and justices of the peace of counties as to the manner of appointing the persons to hold elections, and so forth, by law for the purpose of holding other elections, and townships shall have corporate powers for the purpose of this act. If the result of any such election shall show that a majority of the qualified voters of any township or city, town, county, or other municipal corporation, favor the taking of the amount of stock so voted for in such election, then the authorities who by this act, are empowered to determine what amount of stock shall be taken shall subscribe the amount of stock so voted for in said company, and shall have power to levy and collect taxes for that special purpose to pay for the said stock in installments as the same may become due, or, in case it shall not be deemed best to collect taxes to pay by taxation such subscription for stock, then such township, or city, town, county

or other municipal corporation, shall have power to issue
19 bonds for the purpose of raising money to pay for such subscription, and shall provide for the payment of interest upon said bonds, and also for the payment of said bonds when they become due. Provided, however, that any township, county or other corporate authorities who shall issue any bonds or issue any obligations in behalf of this road shall be required to commence as soon as said obligations are assumed to provide a sinking fund that shall be sufficient to liquidate said bonds or obligations at maturity; provided further, that nothing in this charter shall be construed to exempt said railroad from taxation.

SEC. 5. That this act shall be in force from and after its ratification.

Read three times in the General Assembly and ratified the 20th day of February, A. D. 1879.

EXHIBIT "F."

Six per Cent. Bond.

(Copy.)

The County of Wilkes, State of North Carolina, is indebted to the bearer in the sum of one thousand dollars, lawful money of the United States, payable on the first day of October, 1904, with interest thereon from the first day of October, A. D. 1889, at six per cent. per annum, payable on the first days of April and October in each year, at the Wachovia National Bank of Winston, North Carolina, on presentation and surrender of the respective coupons hereto attached, as they severally become due and payable.

This bond is one of a series of one hundred bonds of the denomination of one thousand dollars each, issued by authority of an act of the General Assembly of North Carolina, ratified the 20th day of February, A. D. 1879, entitled "An act to amend the charter of the Northwestern North Carolina railroad for the construction of a Second division from the towns of Winston and Salem, in Forsyth county, up the Yadkin valley, by Wilkesboro, to Patterson's factory, Caldwell county," and authorized by a vote of a majority of the qualified voters of Wilkes county, by an election regularly held for that purpose, on the 6th day of November, A. D. 1889, and by an order of the board of commissioners of Wilkes county, made on the first day of April, A. D. 1889. This series of bonds is issued to pay the subscription of one hundred thousand dollars, made to the capital stock of the Northwestern North Carolina Railroad Company by said county of Wilkes. In witness whereof, the chairman of the
20 board of county commissioners and the clerk of the said board have hereunto subscribed their names, and the said clerk has affixed the seal of said board of commissioners, this 1st day of October, A. D. 1889.

(Signed) R. W. COLVARD,
Chairman Board of Commissioners of Wilkes Co.

(Signed) J. M. ADAMS,
[SEAL.] *Clerk Board of Commissioners Wilkes Co.*

EXHIBIT "G."

An act to authorize the Northwestern North Carolina Railroad Company to extend its road and to build branches thereof.

The General Assembly of North Carolina do enact:

SECTION 1. That it shall be lawful for the Northwestern North Carolina Railroad Company to extend and construct its line of road, or a branch thereof, to commence at or near Winston, in the county of Forsyth, through the counties of Forsyth, Davidson, Yadkin, Davie, Rowan, and Iredell, or any or either of them, to Statesville, or some other point on the Western North Carolina railroad, and may build and operate additional branches thereto, or from its present main line to any important mines or manufactories in any of said counties, or counties adjacent to them; provided, that nothing contained in this act shall operate to be construed so as to prevent or interfere with the construction of the North Carolina extension of the Virginia Midland railroad from Danville, Virginia, via Winston, Forsyth county, and Mocksville, Davie county, to some point on the Atlantic, Tennessee, and Ohio railroad in Iredell county; but said company is hereby authorized to build said road under the organization and consolidation heretofore made by the stockholders and directors of the consolidated line composing the North Carolina extension.

SEC. 2. That to provide the means in whole or in part for this purpose, the said company may receive subscriptions in money, labor, property, or otherwise, as the said company may agree, and may mortgage or otherwise pledge its property and franchises and the work constructed, or to be constructed, with the franchises and rights connected therewith.

SEC. 3. That any corporation, county, city, town or township interested therein, may subscribe to stock for said purpose, or
21 otherwise contribute to such work in such manner and in such amount as shall be determined by the proper authorities of such corporation, county, city, town, or township, and agreed on with the said Northwestern North Carolina Railroad Company.

SEC. 4. This act shall be in force from and after its ratification.

In the General Assembly, read three times and ratified this the 2nd day of March, A. D. 1881.

EXHIBIT "H."

1. Statutes bearing on the authority to issue bonds.
   Chapter 136 of the Laws of N. C., 1852.
   Chapter 17 of Ordinances of Constitutional Convention of 1868.
   Chapter 33 of the Laws of 1868 and 1869.
   Chapter 90 of the Laws of 1868 and 1869.
   Chapter 100 of the Laws of 1869 and 1870.
   Chapter 178 of the Laws of 1870 and 1871.

Chapter 25 of the Laws of 1871 and 1872.
Chapter 47 of the Laws of 1871 and 1872.
Chapter 140 of the Laws of 1872 and 1873.
Code of North Carolina, section 1967, subsection 10.

2. As to board of commissioners being successors of justices of the peace.

Green *vs.* Commissioners, 67–117. Johnston *vs.* Commissioners, 67–101.
Alexander *vs.* Commissioners, 67–331. Street *vs.* Commissioners, 70–644.

3. As to decisions upholding Forsyth County bonds issued to road.

Hill *vs.* Commissioners, 67–367. Belo *vs.* Commissioners, 76–489.
Galloway *vs.* R. R. Co., 63–147. Bank *vs.* Statesville, 84–169.

Extracts from Journal of House of Representatives, Filed as Exhibit to Bill of Complaint.

The following extracts from the Journal of the House of Representatives of the General Assembly of North Carolina were offered with the entire printed Journal, to show that the act of August 11, 1868, which is one of the exhibits attached to the bill of complaint, failed to pass in the manner prescribed by the constitution of North Carolina, article 2, section 14:

22 "A message was received from the Senate concurring in the amendment to the bill in relation to marriage licenses."..... .....

....

"Also a message transmitting a bill ratifying and confirming the charter of the Northwestern North Carolina Railroad Company..... .....

....

"On motion of Mr. Vest, the senate bill to ratify the charter of the Northwestern North Carolina Railroad Company was taken up, and referred to the finance committee."..... .....

....

"The senate bill to ratify the charter of the Northwestern North Carolina Railroad Company passed its final reading."..... .....

....

"Mr. Rhodes, from the committee on enrolled bills, reported as correctly enrolled the following, which were signed by the speaker and transmitted to the senate:

"A bill ratifying the charter of the Northwestern North Carolina Railroad Company."

The foregoing were the only entries in reference to the passage of the said act contained in the official printed Journal, and it was not denied that it failed to pass in accordance with art. 2, sec. 14.

Endorsed: Filed in this office, April 17, 1899. Sam'l L. Trogdon, clerk.

Equity Subpœna.

UNITED STATES OF AMERICA,
Western District of North Carolina.

The United States of America to the Board of Commissioners of Wilkes County and Clarence Call, ex-sheriff and *ex officio* ex-treasurer, and John H. Johnson, sheriff and *ex officio* treasurer of Wilkes county:

We command you, and every one of you, that you appear before the judges of our circuit court of the United States of America, for the western district of North Carolina, in the town of Asheville, in said district at 12 o'clock m., on the eighth day of the month of March next, at which time and place this cause is set down
23 for hearing, to answer the bill of complaint of W. N. Coler, W. N. Coler, Jr., Bird S. Coler, James W. Campbell, and Francis W. Coler, bankers, under the name and style of W. N. Coler and Company, filed in the clerk's office of said court in said town of Statesville, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the western district of North Carolina to execute.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Statesville, in said district, the 25th day of February, 1899, and in the 123rd year of the Independence of the United States.

H. C. COWLES, *Clerk.*

MEMORANDUM.—The within-named defendants are notified that unless they enter their appearance in the clerk's office of said circuit court, at Asheville, in said district aforesaid, on or before the day to which the within writ is returnable, the complaint will be taken against them as confessed and a decree entered accordingly.

(Signed) H. C. COWLES, *Clerk.*

Endorsed.

Received Feb'y 25–'99. Executed same day by delivering certified copies of same to J. T. Peden, chairman board of county comm'rs of Wilkes Co., and Clarence Call, ex-sheriff and *ex officio* ex-treasurer, and to John H. Johnson, sheriff and *ex officio* treasurer of said county.

J. M. MILLIKAN, *U. S. M.*,
By P. D. ATWELL,
Dep-ty U. S. M.

Endorsed: Filed in this office, April 12, 1899. Sam'l L. Trogdon, clerk.

24 *Answer of Board of Commissioners of Wilkes County.*

UNITED STATES OF AMERICA:

In the United States Circuit Court, Western District of North Carolina.

W. N. COLER, W. N. COLER, JR., BIRD S. COLER, JAMES W. Campbell, and Francis B. Coler, under the Name and Style of W. N. Coler & Company, Complainants,

versus

THE BOARD OF COMMISSIONERS OF WILKES COUNTY and CLARence Call, ex-Sheriff and *ex Officio and* ex-Treasurer, and John H. Johnson, Sheriff and Treasurer *ex Officio*, of Wilkes Co., Respondents.

The Board of Commissioners of Wilkes County, the above-named respondents, reserving to themselves the right to demur to the jurisdiction of the court, for answer to the bill of complaint of the plaintiff, says:

1.

That in answer to the first paragraph of the bill of complaint, these respondents say that they have no knowledge or information sufficient to form a belief as to the allegation that the plaintiffs are the holders of what purport to be the bonds of the county of Wilkes; but if it be true that they had such papers, these respondents are advised by counsel, and therefore allege that they are invalid for want of authority of law in the board of commissioners of Wilkes county to issue such bonds or create a bonded indebtedness against said county, under either the statute recited as authority in the face of such pretended bond, or by virtue of any power conferred by any other acts of the General Assembly of North Carolina relied upon by the complainants to sustain their authority.

2.

That the allegations contained in paragraph second of the bill of complaint are, as respondents are informed and believes, true.

3.

That respondents have no knowledge or information sufficient to form a belief as to the price paid by the complainant for bonds; but respondents deny the truth of the allegation that such bonds were purchased without notice express or implied that they were void and invalid, and aver that there was no act of the General Assembly of North Carolina which authorized the board of commissioners of Wilkes county to create such bonded indebtedness. Respondents especially aver that the amendments to the charter of the North Western North Carolina Railroad Company are void for the reason, that they were not enacted in accordance with the mandatory requirements of article 2, section 14, of the con-

stitution of North Carolina, including in the amendments to which this foregoing averment applied, not only those enacted by the General Assembly at its session of 1879 and 1881, respectively, but also to the amendments of said charter enacted at the special session of 1868 of the General Assembly of North Carolina, and in reference to said last-named amendment, respondents aver that, if it had not been invalid because not enacted in accordance with said requirements, it nevertheless upon its face failed to confer or purport to confer any authority to issue bonds or to lay a special tax to pay the same other than to the county of Forsythe. These respondents further aver that the original charter of the North Western North Carolina Railroad Company was enacted as an ordinance of the constitutional convention of 1868 and went into effect and became operative before the ratification of the constitution framed by said convention on the 24th of April, 1868, for the reason that certain restrictive clauses contained in articles 5 and 7 of said constitution, limited the powers of the counties and other municipal corporations by prescribing conditions precedent to the exercise of authority by them to create such bonded indebtedness and rendered it necessary that new enabling acts should be passed by the General Assembly after the ratification of the constitution on said 24th day of April, 1868, in order to clothe such municipal corporations with power to create such indebtedness, as respondents are advised.

4

These respondents admit that the Board of Commissioners of Wilkes County issued without authority of law what purported to be bonds to the amount of one hundred thousand dollars ($100,000), and aver that said bonds were issued without authority of law, and that all purchasers of such bonds are required to look to the legal authority for their issue and in contemplation of law were charged with the nature of the said insufficiency of the statutory authority relied upon.

26 Respondents admit that interest on said bonds was paid for eight years, but deny that, as respondents are advised, the payment of interest on such void bonds can impart validity to them.

5

Respondents have no knowledge or information sufficient to form a belief as to the allegations contained in the 5th paragraph of the bill of complaint and therefore demand strict proof.

6

These respondents admit that no interest has been paid by the county of Wilkes on the said pretended bonds since December, 1897, but deny the allegation therein contained that the defendants, The ex-Treasurer and The Treasurer of Wilkes County, sustained a fiduciary relation to the complainants or that such relation exists between these respondents and the complainants, as respondents are advised and believe.

7

These respondents, still denying that fiduciary relation exists, admit that their predecessors in office, whose term expired on the first Monday in December, 1898, did bring an action to enjoin Clarence Hall, then *ex officio* treasurer of Wilkes county, and that an order of injunction was granted in the superior court of Wilkes county, which upon a subsequent appeal to the supreme court of North Carolina was held to be the proper exercise of the extraordinary powers of the court, and that it appeared in said action that there was fund in the hands of said treasurer, collected under a levy made for the purpose of paying the interest on such pretended bonded debt semi-annually.

8

These respondents admit that said action was brought in the name of the Board of Commissioners of Wilkes County and C. C. Wright, a tax-payer, but upon information and belief deny the allegation that no bondholder was made a party, and aver, upon information and belief, that one J. M. Turner and J. M. Welborn were on motion made defendants in this action, and claiming as the holder of one of the said pretended bonds, and after inviting all other holders of such bonds to join with them, appealed from an adverse judgment of the superior court of Wilkes county to the supreme court of North Carolina, upon the hearing of which appeal it was adjudged that the said bonds were invalid.

27 9.

Respondents aver that the action in the State court referred to in the 9th paragraph of the complaint was brought by their predecessors in office, but, as respondents are advised and believe, the said action was brought under the advice of counsel that the said bonds were void *ab initio*, for want of lawful authority to issue them, and that all purchasers are charged with notice of such defect of power, and that it was a refusal to pay an invalid debt, not a repudiation of a valid obligation, and respondents are advised that the supreme court of North Carolina, by its adjudication in said action, sustained the contention of their predecessors.

Respondents have no information as to the motives which induced their predecessors in office to bring said action in the courts of the State of North Carolina, but are advised that citizens of the State are not required to apologize for seeking redress or protection from any courts of competent jurisdiction. Upon information and belief, respondents aver that the counsel for their predecessors in office would, when said action was brought, have made any bondholders who could be reached by the process of said court parties defendant, if they had known of any such holders.

10.

Respondents admit the truth of the allegations, contained in the tenth (10) paragraph of the complainants' complaint.

11.

Answering the eleventh paragraph of the complaint, these respondents admit that on the 18th day of February, 1898, the Hon. Henry R. Starbuck adjudged after a hearing upon an order to show cause, that the defendant therein, Clarence Call, should be enjoined and restrained until the final hearing of this cause from paying any portion of the interest on the bonds in controversy, and respondents further admit and aver that on the 18th day of February, 1898, the said Starbuck, judge, as aforesaid, entered upon the back of said restraining order, or injunction, the following memorandum or order of appeal:

"To this judgment defendant excepts, 15 days allows- defendant to serve statement of case on appeal and 10 days thereafter allowed pl't'ff to serve exceptions or counter-statements. Appeal bond fixed at $100. H. R. Starbuck, judge."

28 Further answering said section 11 of complaint, these defendants aver that under the provisions of 550 of the Code of North Carolina, the defendant, Call, as they are advised, would have been allowed but ten days from the entry of appeal taken on said 18th day of February to prepare and serve his statement of case on appeal but for the stipulation of opposing counsel to agree to 15 days, but, as respondents are informed and believe, and are advised, before the expiration of the said 15 days from said 18th day of February, Lindsey Patterson, Esq., counsel for the said Clarence Call, sheriff and *ex officio* treasurer as aforesaid, notified A. C. Avery, of counsel for the plaintiff in said action that he, the said Patterson, would not perfect or prosecute said appeal, and that, as respondents are informed and believe, the said Patterson notified said Starbuck, judge, before the expiration of the said 15 days of his purpose to abandon such appeal, and that the said Starbuck informed the said Avery that the said Patterson had so communicated his purpose to him. Respondents further answering said last-named paragraph, say that, as they are informed and believe, on the 7th day of March, 1898, at the spring term of the superior court of Wilkes county, and after the expiration of the said 15 days from the said 18th day of February, and before any motion was made for a final judgment, the said J. M. Turner and J. M. Welburn moved the said court, as the owners of one of the bonds in controversy, to be allowed to become parties defendants, and said order was on the same day allowed by Coble, judge, presiding, and was filed on the 18th of March, 1898, upon which day also the said Turner and Welburn, in pursuance of said order, filed their answer in said action.

Further answering said last-named paragraph of bill of complaint, these respondents aver that, as they are informed and believe, on said 8th day of March, 1898, the counsel for the plaintiff in said action, and R. N. Hackett, counsel for the defendants, Welburn and Turner, upon a suggestion of the Hon. Albert Coble, judge presiding, that he was the brother-in-law of the said J. Lindsey Patterson, who was not only counsel for the said Clarence Call, but was also counsel for his stepmother and the stepmother of the wife of Judge

Coble, and that the stepmother, Mrs. Patterson, was the holder of several thousand dollars of said Wilkes County bonds, agreed that the said Coble might make a consent order that a motion which had been made on the filing of said answer on behalf of said Turner and Welburn to vacate the restraining order theretofore made by said Starbuck, at chambers, might be heard before said Starbuck,
29 judge, and that thereupon the said motion was heard by the said Starbuck at chambers, at Morganton, on the 22nd day of March, 1898, and that from a refusal of this said motion the defendant-, Turner and Welburn, appealed to the supreme court of North Carolina, upon the hearing of which appeal the said bonds were adjudged to be void and invalid, as aforesaid.

12.

That for answer to the 12th paragraph, these respondents refer to the averments above set forth in answer to paragraph 11.

13.

These respondents admit that the defendants, Turner and Welburn, were allowed as aforesaid, to file an answer after the expiration of the time allowed said Call, but respondents are advised that the said answer was filed in accordance with the established practice of the said courts before any final judgment had been prayed, or any final judgment had been entered in this action.

14.

Answering the 14th paragraph of the complaint, these respondents admit that the superior court adjudged upon the hearing that the bonds were void for want of power in the commissioners to issue them.

15.

That the allegations contained in the 15th section of the complaint are admitted to be true.

16.

These respondents are advised by their counsel that the legal opinion contained in the 16th paragraph of the bill of complaint, to the effect that the said action was a proceeding instituted by a principal against an agent, is erroneous, and in conflict with the opinion of the supreme court of North Carolina construing its own statutes, and in defining the duties and powers of its own officers thereunder, as appears in the opinion of Board of Education *vs.* Commissioners, 113 North Carolina, at pages 379, 388, 389. These respondents deny the allegations that there was no adverse party to said action, and aver that, had the said Call paid out the funds in his hands levied for the purpose of paying the interest on said bonds to the holders of the said bonds contrary to the orders of the said commissioners of the county of Wilkes — would not, as respondents are advised by
30 counsel, have had any redress under the law as construed by the supreme court of the State against said treasurer officially or upon his bonds. Further answering, the respondents say that

they are advised that the supreme court of North Carolina passed upon an appeal in a similar case brought for a similar purpose, wherein the only parties were the Commissioners of Stanley County, as plaintiffs, and the treasurer of said county, as defendant, and that it was the duty of the said court, of its own motion, to dismiss where there was a want of jurisdiction, and these respondents are advised that the said court, in legal contemplation, gave its sanction to the right to maintain said action against said treasurer.

That these respondents have no personal knowledge as to whether the said Turner and Welburn are or not the owners of the said bonds, but are informed and believe that the said Turner and Welburn are ready to file affidavits that they are the *bona fide* owners of the bond claimed by them, and, upon such information and belief, these respondents aver that they are such true owners. These defendants have no knowledge or information as to the purpose of the said Turner and Welburn in making themselves parties to said action, and, therefore, hold the plaintiff to strict proof of the allegation that their purpose was to effect a repudiation of said bond.

Further answering the said last-named paragraph of the bill of complaint, respondents say that the said Clarence Call, after the expiration of his term of office as sheriff, being still *ex officio* treasurer of Wilkes county, appear*ing* before two of these respondents, to wit: Leander Jennings and William Barlow, in the absence of the chairman of the board, John T. Peden, at a meeting held soon after their induction into office, and exhibited the execution for the costs of the said appeal to the supreme court of North Carolina, and insisted that the said judgment was against him, Call, as well as against said Turner and Welburn, and insisted that it was the duty of the respondent board to pay said execution, and the said Call insisted, among other things that he, as treasurer, was a party to said action, that it was the duty of the commissioners to hold him harmless, and that he had the promise of the old board that he would be subjected to no costs, and that he had paid the bill of costs presented, and demanded credit for said payment on the settlement which he was then making, and, thereupon, the two respondents above named, under a mistake as to their official duty, and not through any wrongful or collusive purpose, consented to allow the amount of the said superior court judgment which had been
31 theretofore paid by said Call, to be a credit in his favor in said settlement with him as sheriff and tax collector, and respondents understood their counsel to assent to the allowance of said credit.

17.

Answering section 17 of the bill of complaint, these respondents say that it is true, according to their information and belief, that the said Turner and Welburn have sued out a writ of error to the Supreme Court of the United States, but it is not true that these respondents have entered into any agreement with the said Turner and Welborn to pay the costs of suing out the said writ of error out of the county funds as alleged, and these respondents have no knowl-

edge or information sufficient to form a belief as to the making of any agreement by their said predecessors in office to pay any such costs.

Further answering said section of the bill of complaint, these respondents say that it is a matter of law for the court to determine whether there is a Federal question involved in such appeal, and respondents are advised that all judges of the circuit court of the United States are not only willing but anxious to be anticipated in passing upon controversies by a court whose adjudications are the supreme law of the land and are more than willing that the law's delays should be prevented by such speedy adjudication.

18, 19.

That these respondents admit that the Northwestern North Carolina Railroad Company was chartered by the constitutional convention of North Carolina in 1868, as alleged in complaint.

20.

That those respondents have no knowledge or information sufficient to form a belief as to the time when the Northwestern North Carolina Railroad Company was organized, and therefore hold the complainants to strict proof as to the allegation that said company was organized April 16th, 1868.

21.

Answering the section of the bill of complaint mentioned 21 in the copy of the bill of complaint served on them, these re-
32 spondents say that neither the act ratified ont he 11th day of August, 1868, nor the act ratified on the 18th day of February, 1879, nor the act of March 2, 1881, mentioned in the said section of the complaint, were enacted in the manner prescribed by section 14, article 2 of the constitution of North Carolina, and every one of the said acts is null and void by reason thereof, and constitutes no authority for the issue of said bonds. The said ordinance of the convention of 1868 is not re-enacted or ratified or confirmed by said void act, because of said defect in the manner of its enactment, and the said original charter fails to confer the authority to create such bonded debt, because it was not supplemented by the enactment of any valid, enabling act as an amendment to said original charter, as these respondents are advised by counsel. Further answering said section, these respondents say that the sections of the code attached to the bill of complaint and marked Exhibits B. G. D and E do not constitute lawful authority for issuing said bonds, because said statutes are not local and special, as required by sections 1, 6 and 7 of article 5 of the constitution of North Carolina, and are insufficient as authority for issuing said bonds, and respondents say further that said sections of code failed to authorize the issue of said bonds, because said Northwestern North Carolina railroad was not within the meaning and proper construction of section 1996 of the code, one in which the citizens of the county of Wilkes had an in-

terest, nor was the subscription made necessary to aid in the completion of the same.

Further answering said section, these respondents aver the said bonds each contained a recital upon its face (as will appear from an inspection of Exhibit F, attached to complaint) that the said bonds were issued by virtue of authority conferred by the act of February 20th, 1879, which is for the reason aforesaid null and void and no law. These respondents, therefore, aver and plead that, as they are advised, the complainants are estopped from claiming that they were issued by any other authority or pretended authority than the said void statute.

22.

These respondents, still denying the authority of the former commissioners to issue bonds or subscribe to the capital stock to the said company, admit that they did subscribe and issue bonds in the amounts alleged in the complaint, and that it was ascertained and declared that a majority of the qualified voters of Wilkes county had voted in favor of making such subscription and that it is now too late to question said finding as to said vote.

33

23.

These respondents admit that the said company issued certificates, as alleged, of stock to the county of Wilkes, but aver that, according to their best information and belief, the franchise and property of the said company were heavily mortgaged for the completion of the road to Wilkesboro, and from the date of said certificate of stock, and the said mortgages were foreclosed, as alleged in the complaint. Further answering said section, respondents are advised that it is not material that they should give their opinion as to what the county of Wilkes long desired, if it can be truly said of a municipal corporation that it is capable of desiring improvements.

24.

Section 24 of the complaint is admitted to be true.

25.

That respondents have no knowledge or information sufficient to form a belief as to the truth of the allegation contained in section 25 of the complaint, and, therefore, hold the complainants to strict proof.

25*a*.

Answering the section of the complaint mentioned in the copy served on these respondents as 25*a*, these respondents say that the questions involved in this controversy were not adjudicated either in the case of Hill *vs.* Commissioners of Forsythe County, 67 N. C., 367, nor in Belo *vs.* Commissioners, 76 N. C., 489, for the reasons:

1st. That the contract of subscription between the said county of Forsythe and the North Western North Carolina Railroad Company was a completed contract before the ratification of the said constitu-

tion of 1868 on the 24th day of April, 1868, and no enabling act was necessary under restrictive clauses of said constitution not then in force.

2nd. Because it did not appear in evidence on the trials of said cases that the said act of August 11th 1868, had not been passed in accordance with the requirements of the constitution, section 14, article 2, and was, therefore void. Further answering said section, these respondents say, that, as they are advised by counsel, neither the payment of interest on these bonds by the county of Wilkes nor the acknowledgement of its governing authorities, the commissioners, was sufficient to impart validity to bonds for want of
34 authority to issue them or to relieve the purchasers of the duty of looking to the authority under which they were issued.

These respondents especially deny that, as they were advised by counsel, there was any adjudication or decision in the supreme court of North Carolina construing the constitution and statutes of said State so as to create a rule of property before said bonds were issued in the year 1889, which can be invoked, notwithstanding the later decisions of said court, but, as they are advised, the allegations that there were any such decisions contained in said section, are not true.

26.

That it is true that John H. Johnson is the present sheriff and that Clarence Call is treasurer until September 1898, by reason of having received the tax-lists of 1898 before said Johnson was elected and qualified as sheriff, and it is admitted that an action has been brought by these respondents against the said Call and his sureties upon his official bond to recover not only a portion of the said tax fund levied to meet the interest on said bonds, but also the general tax. Further answering the said section, these respondents say that they are informed and believe and advised by counsel that one J. Gordon Hackett had been appointed by virtue of an order in the said action carried as aforesaid by a writ of error to the Supreme Court of the United States and receiver was ordered to take charge of all of the said fund collected by virtue of such levy to meet the interest of the said bonds, and had qualified as such receiver before the bill of complaint was filed in this cause, and respondents are advised that this court has no jurisdiction of the said fund, has no authority to make any order as to the jurisdiction of the same since it was in contemplation of law, in custody of the superior court of Wilkes county before this suit was brought.

27.

That respondent are advised that the question whether the complainants are entitled to the relief demanded in section 27 of the complaint is one of law, and, under advice of counsel, respondents deny the right of complainants to such relief.

28.

Further answering, the bill of complaint, these respondents say that they have acted in reference to said bonds and the tax levied for their payment in perfect good faith, and, in order to pro-
35 tect all parties, had entered upon their minutes before the bringing of this suit an order forbidding the defendant, Johnson, *ex officio* treasurer of Wilkes county, from paying out any portion of the said fund collected under the levy to meet the interest on said bonds, as aforesaid, and that said Johnson, treasurer, has now in his hands about seven thousand one hundred dollars of said fund.

A. C. AVERY.
T. J. DULA.
FINLEY & GREEN.

W. F. Barlow, a member of the respondent board of commissioners, being duly sworn, maketh oath that the facts stated in the foregoing answer, as of his own knowledge, are true and that those facts stated therein on information and belief, he believes to be true.

W. F. BARLOW.

Sworn to and subscribed before me this the 3rd of April, A. D. 1899, as witness my hand and official seal.

[SEAL.] L. BUMGARNER, *C. S. C.*,
By H. T. SMOOK, *D. C.*

Endorsed: Filed in this office April 18th, 1899. Sam'l L. Trogdon, clerk.

Supplemental Answer of the Board of Commissioners of Wilkes County.

UNITED STATES OF AMERICA:

In the United States Circuit Court, Western District of North Carolina.

W. N. COLER, W. N. COLER, JR., BIRD S. COLER, JAMES W. Campbell, and Francis B. Coler, under the Name and Style of W. N. Coler & Company, Complainants,

versus

THE BOARD OF COMMISSIONERS OF WILKES COUNTY and CLARENCE Call, ex-Sheriff & *ex Officio* & ex-Treasurer, and John H. Johnson, Sheriff and Treasurer *ex Officio* of Wilkes Co., Respondents.

The defendants The Board of Commissioners of Wilkes
36 County, now, and at all times hereafter, saving to themselves all and all manner of benefit or advantage of exceptions or otherwise that can or may be had or taken to the many errors, uncertainties and the imperfections in the said bill contained, for further answer thereto, or to so much thereof as these defendants are advised is material or necessary for them to make answer to, answering, in addition to the answer hereto verified but filed at the hearing with this supplement, says:

1.

Further answering the said bill of complaint, this defendant says that it is informed and believes that the action entitled "The Board of Commissioners of Wilkes County and C. C. Wright *versus* Clarence Call and others" referred to in the bill of complaint as having been adjudicated in the supreme court of North Carolina, had before the filing of the said bill been carried by writ of error to the Supreme Court of the United States, — has since held that the Federal courts are bound to follow the adjudications of the State courts in that case, and affiant is advised by counsel that if such has been — adjudication of said court the holders of one of the bonds in controversy having been parties to said action, the question involved in this cause and set forth in the bill of complaint as the plaintiff's ground of complaint having been adjudicated, *and* the plaintiffs are estopped from denying that the bonds in controversy are invalid for want of authority in the said board of commissioners to issue them, and this defendant is further advised, informed and believes that after said action had been carried by writ of error to the said Supreme Court, and while it was there pending the superior court of Wilkes county, in the exercise of its rightful jurisdiction, and to the end that the fund mentioned in the bill of complaint as collected under a special levy to meet the interest on the bonds in controversy and as being in the hands either of the defendant Call or the defendant Johnson be protected and preserved to await the orders of the court to be made in pursuance of the adjudication of the Supreme Court of the United States, made, upon petition in said action, an order, which was signed by Starbuck, resident judge of the judicial district in which Wilkes county is situated, and having rightful jurisdiction in the premises, by which order it was adjudged that Gordon Hackett *the* appointed receiver to take charge of and hold under the direction of said superior court all funds that might be collected by the tax collector of Wilkes county as a special tax to meet the interest on said bonds. (A copy of the record in said case, including said order appointing a receiver, is hereto attached marked Exhibit K.)

37 2.

And this defendant is advised, informed and believes that, upon the making of said order, the said superior court acquired jurisdiction to appoint a receiver and to control the said fund as collected, and to hold the same subject to the action of said higher court, and this defendant, therefore, being so advised, specially avers and pleads that this court has no jurisdiction to appoint a receiver, because the said court, which is one of concurrent jurisdiction, had already assumed control of the said fund before the bill of complaint was filed.

And this defendant is further advised, informed and believes the question- and issues involved in this controversy and set up as a cause of action, or the grounds of the suit in the bill of complaint, has already been adjudicated finally by the Supreme Court of the

United States upon the hearing on the said writ of error, in which action the holders of one of said bonds had made themselves parties and had invited all other holders of said bonds to join them as parties defendants, and that said adjudication has been made since the same bill of complaint was filed, and this defendant specially avers and pleads that the plaintiffs are estopped by the said adjudication and will be finally estopped by the rendition of a final judgment in the superior court of Wilkes county upon the coming down of the certificate therein, and this defendant prays the court to continue the case until the coming down of said certificate, to the end that he may be enabled to properly plead as a defense that the questions and issues involved in this controversy have been so finally adjudicated and that the plaintiffs are estopped.

3.

Further answering the said bill of complaint, this defendant says that it is advised, informed and believes that the bonds in controversy were issued and the debt apparently evidenced thereby was created without authority of law by the predecessor in office of the present board of commissioners of Wilkes county — is involved, and this defendant is ready to surrender and orders a surrender of the certificates of stock issued to it by the North Western North Carolina Railroad Company, which has always been worthless, because of a mortgage executed contemporaneously with its issues.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith *he* is by the said bill
38 charged, without this, that there is any other matter, cause, or thing, in the said plaintiff's said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly prays to be hence dismissed with *his* reasonable costs and charges in this behalf most wrongfully sustained.

A. C. AVERY,
T. J. DULA,
FINLEY & GREEN,
Attorneys.

L. C. Jennings, being duly sworn, maketh oath that he is a member of the board of county commissioners of Wilkes county, and that the facts stated in the foregoing answer, as of his own knowledge, are true, and those facts stated on information and belief, he believes to be true.

L. C. JENNINGS.

Sworn to and subs ribed before me this, the 12th day of April, 1899, as witness my hand and seal of office.

[SEAL.] ERNEST CLAPP,
Deputy Clerk Superior Court.

Endorsed: Filed April 12th, 1899, by leave of the court as a supplement to the answer.

Exhibit K to Supplemental Answer, Transcript of Record from Supr. Court of Wilkes Co.

THE BOARD OF COMMISSIONERS OF WILKES County and C. C. Wright *against* CLARENCE CALL, Sheriff and *ex Officio* Treasurer of Wilkes County. } No. 338. From Wilkes.

Agreement of parties.

It is agreed that in addition to the pleadings, and exhibits, and affidavits offered at the former hearing, the original charter of the Northwestern North Carolina Railroad Company passed by
39 the constitutional convention of 1868, and all amendments thereto, including the amendatory acts of 1879 and 1881, shall be considered in evidence, and that the amendments passed in 1879 and 1881, purporting to give to counties authority to submit the question of subscription to the capital stock of the company, were not passed by the house of representatives in accordance with the requirements of the constitution, and the certified exhibits from the journals of said sessions need not be offered or sent up as a part of the testimony.

It is agreed that the only legislation that is relied upon to give such authority is the original charter, passed as an ordinance of the constitutional convention of 1868, and the general statute enacted in 1868 as chapter —, being in the same language as contained in the code, sections 1996 to 2000, both inclusive.

It is further agreed that the plaintiff still objects to the testimony offered for the defendant, Call, on the former hearing, to show when the Northwestern North Carolina Railroad Company was organized or incorporated.

(Signed) A. C. AVERY,
Attorney for Plaintiffs.

(Signed) RICHARD N. HACKETT,
Attorney for Defendants, J. M. Turner and J. M. Wellborn.

Summons.

To the coroner of Wilkes county, Greeting:

You are hereby commanded to summon Clarence Call, sheriff and *ex officio* treasurer of Wilkes county, the defendant above named, if he be found in your county, to be and appear before the judge of our superior court at a court to be held in the county of Wilkes, at the court-house in Wilkesboro, on the first Monday after the fourth Monday of February, it being the 7th day of March, 1898, and answer the complaint which will be deposited in the office of the

clerk of the superior court of said county within the first three days of said term; and let the said defendant take notice that, if he fail to answer the said complaint within the time required by law, the plaintiff will apply to the court for the relief demanded in the complaint.

Hereof fail not, and of this summons make due return.

Given under my hand and seal of said court, this 23rd day of December, 1897.

(Signed) A. M. VANNOY,
Clerk Superior Court.

40 We acknowledge ourselves bound unto Clarence Call, sheriff and *ex officio* treasurer of Wilkes county, the defendant in this action, in the sum of two hundred dollars to be void, however, if the plaintiffs, The Board of Commissioners of Wilkes County, and C. C. Wright, shall pay to the defendant all such costs as the defendant may recover of the plaintiff in this action.

Witness our hands and seals this 23rd day of December, 1897.

(Signed) C. C. WRIGHT. [SEAL.]
Chairman pro Tem.
(Signed) R. A. SPAINHOUR. [SEAL.]

Bonds.

We, the undersigned, acknowledge ourselves indebted to the defendant in the above-entitled order in the sum of two hundred dollars, to be void on condition that the plaintiffs in said action will pay to said defendant such damage, not exceeding said sum of two hundred dollars, as said defendant may sustain by reason of the injunction granted them, if the court shall finally decide that the plaintiffs was not entitled thereto.

In witness whereof we have hereunto set our hand and affixed our seal this the 5th day of January, 1898.

THE BOARD OF COUNTY COMMISSIONERS OF WILKES COUNTY,
By C. C. WRIGHT, *Chairman pro Tem.*
(Signed) C. C. WRIGHT. [SEAL.]
(Signed) R. A. SPAINHOUR. [SEAL.]

R. A. Spainhour, surety to the foregoing undertaking, maketh oath before me that he has property over and above his homestead and personal property exemptions, and all other liabilities, worth the sum of two hundred dollars, the amount mentioned in said undertaking.

(Signed) R. A. SPAINHOUR.

Sworn to and subscribed before me this 5th day of January, 1898; and I hereby affirm the surety to the undertaking, and adjudge it sufficient.

(Signed) A. M. VANNOY, *Clerk.*

41 *Complaint.*

The plaintiffs complain and allege:

1. That P. A. Lomax is chairman of the board of county commissioners of Wilkes county, and that W. C. Myers, C. C. Wright, A. M. Church, and R. P. Yates are county commissioners, *an* act with said chairman in discharging the duties as such of the plaintiff board; and that the plaintiff, C. C. Wright, is a resident citizen and tax-payer of the county of Wilkes.

2. That the defendant, Clarence Call, is sheriff, and by virtue of statutes so providing, has been made an *ex officio* treasurer of the county of Wilkes, and is charged with the duty of receiving and disbursing the moneys of said county.

3. That the Northwestern North Carolina railroad was duly incorporated and organized under an ordinance of the constitutional convention of 1868, which was published as chapter 17 of the constitution and ordinances and resolutions of the constitutional convention of 1868.

4. That the General Assembly at its session of 1869–1870, passed an act (which was published as chapter 100 of the Laws of *laws of* 1869 and 1870), by the terms of which act it was provided that the State of North Carolina might loan to the said railroad company its bonds, if secured by mortgage deeds, conveying the franchise and property of said company, the said bonds to be furnished in installments, as the grading of the line of said railroad should progress; and it was further provided by said act that all acts of the General Assembly theretofore passed, authorizing the issuing of bonds to the State to aid in the completion of the First division as a subscription to the capital stock of said company be repealed; and the General Assembly of North Carolina, at its session of 1870–1871, passed an act which is entitled "An act to enable the Northwestern North Carolina Railroad Company to complete their road to Salem" (which is published as chapter 178 of the Laws of 1870–1871), by the terms of which said act the said company was authorized to consolidate with any other company whose line was then built, or to be built and connected with its line, providing such company should agree and contract to finish the line of the Northwestern North Carolina railroad from Greensboro to Salem.

42 5. That no authority was granted by the State or purported to be granted by the terms of said original charter, or of any of the amendments thereto, hereinbefore mentioned, to any county in the State of North Carolina to subscribe to the capital stock of said company or to create any indebtedness, upon any terms or conditions, in order to aid in the completion of the line of said company.

6. That the General Assembly, at its session of 1871–1872, passed an act (published as charter 25 of the Laws of 1871–1872), entitled "An act to amend the charter of the Northwestern North Carolina railroad and for other purposes;" and also at the same session passed another act (which is published as chapter 47 of the Laws of

1871–1872), entitled "An act supplementary to an act entitled An act to amend the charter of the Northwestern North Carolina Railroad Company," and for other purposes, by the terms of which act it was provided that, upon the acceptance of the amendment of the charter of the said company, the mortgages theretofore executed by said company to the State of North Carolina, to secure loans to said company, should be cancelled; and thereafter the Northwestern North Carolina Railroad Company should be authorized to issue bonds of the company and execute a mortgage deed upon its franchise and property to secure the payment of the principal and interest upon said bonds as they shall fall due. All of said enactments hereinbefore mentioned, as passed by the General Assembly, were duly accepted by the Northwestern North Carolina Railroad Company as amendments to its charter, and became parts thereof; and after their acceptance the State of North Carolina no longer had any interest in the said company, nor did any county in said State, or the citizens of any such county, have any pecuniary interest in said company.

7. That the General Assembly of North Carolina at its session of 1872–1873, passed an act (published as chapter 140 of the Laws of 1872–1873), which so amended the charter of the said company as to authorize subscription to its capital stock to be paid in real estate; but that no amendment to the charter of said company, and no other statute passed by the General Assembly of the State of North Carolina prior to the 20th day of February, A. D. 1879, granted or purported to grant authority to any county to subscribe to the capital stock of the said Northwestern North Carolina Railroad Company; and that prior to the said 20th day of February the said company was not authorized to build any line of railroad, except that extending from the town of Greensboro, in Guilford county, to the town of Winston, in Forsyth county, or to extend its line of railroad to or into the county of Wilkes.

43 8. That the General Assembly, at its session of 1879, passed an act (published as chapter 43 of the Laws of 1879), entitled An act to amend the charter of the Northwestern North Carolina Railroad Company, for the construction of a Second division from the town of Winston-Salem, in Forsyth county, by the Yadkin valley in Wilkesboro, to Patterson's factory, Caldwell county. It was provided in the first section of said act that the said company should be authorized and empowered to extend its line by way of Jonesboro and Wilkesboro, in the county of Wilkes, to Patterson's factory, in the county of Caldwell; and section 4 of said act purported to authorize any county in the State of North Carolina to subscribe to the capital stock of said company, when so authorized to do by a vote of the qualified voters of said county; but the said act, in so far as it purported to give such authority, was unconstitutional, null and void, because, when the said act was read the second time and put upon its passage on its second reading in the house of representatives of the General Assembly of North Carolina, there was no call of the ayes and noes, and the vote upon

such reading was not recorded in the Journal of the House of Representatives, as required by the constitution of North Carolina.

9. That subsequent to the enactment of the last-named act, of the 20th day of February, 1879, the board of commissioners of Wilkes county ordered an election under the provisions of section 4 of said act, which, as the plaintiffs are advised, was null and void (a full transcript of all the proceedings of the board of commissioners of Wilkes county in relation to said election, and to the subscription of the capital stock of the Northwestern North Carolina Railroad Company, which it is claimed was authorized by said vote, being hereto attached, marked Exhibit "A," except that the names of judges of election are omitted, as well as the statement of the vote by townships. It is admitted that at said election a majority of the qualified voters of Wilkes county voted a ticket, whereon was written or printed the word "Railroad.") The plaintiffs are advised and believe that there was no authority for holding said election for the purpose of authorizing such subscription as held then other than that purporting to be granted by section 4, chapter 43 of the Laws of 1879, which, for the reason hereinbefore stated, was null and void.

10. That after said election was held, as aforesaid, the said North Western North Carolina Railroad Company abandoned its claim to demand a subscription from the plaintiff or the county of
44 Wilkes, conceding that said election was held without authority; and that, if authorized, the said railroad company had forfeited its right to demand that board of commissioners of Wilkes county should subscribe to its capital stock, by failure to comply with the conditions upon which said subscription was made.

11. That on the 8th day of October, 1888, a petition was presented to the board of commissioners of the county of Wilkes, asking that another election be ordered, to pass upon the question whether said company should subscribe one hundred thousand dollars to the capital stock of the Northwestern North Carolina Railroad Company; and in response to said petition, an election was accordingly ordered and held on the 6th day of November, 1888, at which election a majority of the qualified voters of Wilkes county voted tickets whereon was written or printed "Subscription." A full transcript of all proceedings of the board of commissioners of Wilkes county, in relation to the authorizing and holding said election, and the declaring of the result, as well as the making of a subscription of one hundred thousand dollars in coupon bonds to the capital stock of said company, and the issue and delivery of said bonds to said company, is hereto attached, marked Exhibit "B." The plaintiffs admit that at the said election the majority of the qualified voters of Wilkes county cast their ballots in favor of the subscription of one hundred thousand dollars to the capital stock of said company. The plaintiffs are advised, informed and believe that no authority had been granted in sections 1900 to 2000, both inclusive, of the Code of North Carolina; and that neither the county of Wilkes nor the citizens of said county

had any pecuniary interest or interest in contemplation of law in the said railroad company at the time that said election was held; and plaintiffs are therefore advised, informed and believe that the said subscription of one hundred thousand dollars, purporting to have been made by the board of commissioners of Wilkes county, was unauthorized; and that the coupon bonds, amounting to one hundred thousand dollars, issued under the color of authority, claimed to be given by said sections of the Code and said election, are invalid, null and void.

12. That accordingly, as appears more fully in the orders embodied in Exhibit "B," hereto attached, in pursuance of a contract, bearing date October 1, 1888, the board of commissioners of Wilkes county caused the said bonds first thirty-three thousand dollars, according to the face value of the same, and subsequently the remaining sixty-seven thousand dollars, to be delivered
45 to the president of said Northwestern North Carolina Railroad Company, reciting upon the face of said bonds that they were issued by virtue of an election held in accordance with the provisions of said sections of the Code of North Carolina; and since the issuing of said bonds the commissioners of said county have annually levied a tax to meet the interest on the same as it accrued; and out of the money derived from said special levy have caused the said interest to be paid, and have taken up the coupons attached to said bonds, said bonds were each (omitting the coupons attached) in form as set forth in a paper hereto attached, marked Exhibit No. 1.

13. That there is now, or ought to be, in the hands of the defendant, Clarence Call, as treasurer of said county about — dollars of the funds levied and collected for the purpose of paying the interest on said bonds; and that the said Call, as sheriff, has collected and has or ought to have turned over to himself as treasurer the moneys levied for the purpose of meeting the interest on said bonds as it may fall due.

14. That the defendant, Clarence Call, in his capacity as treasurer, has been in the habit of paying the interest on said bonds, and taking up the coupons as such interest fell due, without awaiting the orders or direction of the plaintiff board. That, as plaintiffs are advised, informed, and believe, the said Call recently communicated with some of the holders of the bonds and advised them to deliver their coupons and receive the interest from him, lest some proceeding might be instituted to enjoin its payment; and the plaintiffs are informed and believe that the said Call will continue to apply the funds given into his hands under said levy as sheriff, and turn over to himself, in the capacity of treasurer, in payment of the interest on said bonds, unless restrained from doing so by the order of some court of competent jurists; the plaintiffs are advised, informed, and believe that if the said Call, as treasurer, shall apply said moneys in his hands to the payment of said interest, although said bonds may be in contemplation of law invalid, neither the said Call nor the sureties on his official bond, as treasurer, can be held accountable for such application of said moneys,

and, therefore, the plaintiffs will suffer irreparable damage, unless he shall be restrained from making said payments.

Wherefore plaintiffs demand judgment:

1. That the said coupon bonds, amounting to one hundred
46 thousand dollars, purporting to have been issued by virtue of a vote in favor of subscription by a majority of the qualified voters in Wilkes county be declared invalid, null and void.

2. That defendant, Clarence Call, as *ex officio* treasurer of the county of Wilkes, be perpetually enjoined and restrained from paying any portion of the principal or interest on the said bonds issued by the board of commissioners of Wilkes county in payment of a subscription to the Northwestern North Carolina Railroad Company.

3. For such other and further relief as to the court may seem just.

4. For the cost of action.

(Signed) A. C. AVERY, *Attorney.*

C. C. Wright maketh oath before me that the facts set forth in the foregoing affidavit or complaint, as of his own knowledge, are true; and those stated on information and belief he believes to be true.

(Signed) C. C. WRIGHT.

Sworn and subscribed before me, this the 31st day of December, 1897.

WILL P. RAGAN,
Notary Public.

EXHIBIT "A."

Whereas, a petition in accordance with law has been presented to us, asking that an election be ordered in the county of Wilkes, on the 16th day of June, 1887, for the purpose of submitting to the people a proposition to subscribe one hundred thousand dollars to the capital stock of the Northwestern North Carolina railroad.

It is now ordered by us, the county commissioners of Wilkes county, that an election be held on the said 16th day of June, 1887; and that a vote be taken in the county of Wilkes as to whether they will subscribe one hundred thousand dollars to the capital stock of the railroad aforesaid.

It is further ordered, in accordance with the proposition submitted to us by the Richmond and Danville Railroad Company for the extension of the Northwestern North Carolina railroad, that in case that a majority of the qualified voters of Wilkes county shall vote for said subscription, the commissioners shall issue bonds payable at the Wachovia National Bank, of Winston, N. C., due not less than ten,
nor more than forty years (as to the commissioners seems best),
47 after date, said bonds bearing interest at six per cent. per annum, payable semi-annually, said bonds to be placed in the hands of a trustee, to be selected by the commissioners, and one-third of the bonds to be delivered to the railroad authorities when the road is completed and the cars running to a point one-half of the distance between Wilkesboro, in Wilkes county, and Elkin, in

Surry county; and the remaining two-thirds of the bonds, on the completion of the road and the running of the trains to the town of Wilkesboro (or a point just across the river), said bonds to be in denominations of not less than one thousand dollars nor more than five thousand dollars, interest to be paid on said bonds only from the time of delivery.

It is further ordered, in accordance with the provisions submitted to the commissioners by the Richmond and Danville Railroad Co. the railroad Co. must commence work in the county of Wilkes in ninety days after the subscription is voted, and shall continue said work until said road shall be completed, which shall be in eighteen months thereafter; and upon the failure of said road to commence work in ninety days, or to complete their line from Wilkesboro to Winston in eighteen months, as above set forth, then said subscription to said road is to be null and void, and the railroad company shall have no right to demand the bonds issued by the county, but the trustee, in whose hands the bonds are, shall deliver them up to the county commissioners, to be cancelled upon the bonds being issued and delivered, (the Northwestern North Carolina Railroad Co.), shall issue to the county of Wilkes certificate of stock to the amount of one hundred thousand dollars in the capital stock of the Northwestern North Carolina Railroad Company. The said election shall be held under the same provisions, laws and regulations as in the case of the regular State and county elections.

The above order is made at the request of the Richmond and Danville railroad, and with their full concurrence.

(Signed) R. B. GLENN,
Attorney for R. & D. R. R. Co.

Whereas, the Richmond and Danville Railroad Company has made a proposition to the county commissioners of Wilkes county to extend the Northwestern North Carolina railroad from Winston, N. C., to Wilkesboro, N. C., in the event that Wilkes county will subscribe one hundred thousand dollars to the capital stock of the said company, to be paid in bonds of said county according to agreement filed in the office of register of deeds, which
48 appears of record in the minutes of the meeting of our board, one-third of said bonds to be delivered to said railroad company when said railroad is completed to a point half way between Elkin, N. C., and Wilkesboro, N. C., and the remaining two-thirds to be delivered to said railroad company when the railroad is completed to Wilkesboro, N. C., or a point just opposite said town, as expressed in said agreement.

Now, therefore, in pursuance of the agreement filed, and in accordance with the stipulation therein contained, we do hereby subscribe one hundred thousand dollars to the capital stock of said company, according to the stipulations of said agreement, subject to the will of the qualified voters of Wilkes county; and to ascertain the same of said voters, an election is hereby ordered to be held at the various precincts of said county, on the 16th day of June, 1887, at which election to be held under the laws and regulations

of general county and State elections. Those favoring said subscription shall vote a written or printed ticket with the word "Railroad;" and those opposing, like tickets with the words "No railroad." And the following are appointed registrars and judges of said election in the various townships, and the register of deeds will issue notice to each.

Ordered by the board, that the registrars and judges of said election meet at the voting precincts of their respective townships on Saturday before said election and revise the registration books, and make report of the same to the board.

Commissioners' Court, June 16, 1887.

Telegram from A. B. Andrews to R. B. Glenn, attorney for Richmond and Danville Railroad Company, as follows:

RALEIGH, *June* 1, 1887.

Received at Winston, June 1st.

To R. B. Glenn:

I learn that it has been said by some parties of Wilkes county that the proposition that you made as our attorney, to extend the Northwestern North Carolina railroad, was not binding on us, as it was made by you as attorney. I hereby confirm your action, and the proposition is binding on the company.

A. B. ANDREWS.

49 NORTH CAROLINA, }
Wilkes County. }

The board of county canvassers for said county, having canvassed and judicially determined the original returns of the election in the several precincts in the county, June 16, 1887, on the question of subscribing one hundred thousand dollars to the capital stock of the Northwestern North Carolina Railroad Company, I do hereby certify, as chairman of said board, that it appears to be three thousand, seven hundred and thirty-eight registered voters of said county, and that two thousand eight hundred and ninety-five votes cast in favor of "Railroad," and fifty-nine votes cast "No railroad," and one vote cast against subscription; and as chairman of said board of canvassers do declare that a majority of the qualified voters having voted in favor of said subscription, that the same has been ratified by the voters of said county.

June 18, 1887.

(Signed) L. D. BURCHAM,
Chm. Board of Co. Canvassers.

STATE OF NORTH CAROLINA, }
Wilkes County. }

Commissioners' Court, July Term, 1887.

Whereas, an election was duly held in Wilkes county on the 16th day of June, 1887, in accordance with an order previously made by

the board of county commissioners, for the purpose of submitting to the qualified voters of Wilkes county a proposition to subscribe one hundred thousand dollars to the capital stock of the Northwestern North Carolina Railroad Company; and, whereas, it appears to us from the returns of the election (held in the county of Wilkes at the time aforesaid) that a majority of the qualified voters of Wilkes county voted in favor of railroad, which vote was duly declared and adjudged correct by the board of county canvassers, and the same properly reported to us. And it appears to us that a majority of the qualified voters were in favor of said proposition:

Now, therefore, we, the board of county commissioners of Wilkes county, by authority of the power invested in us by law, do hereby subscribe on our books to the capital stock of the Northwestern North Carolina Railroad Company the sum of one hundred thousand dollars, under the limitations and conditions as contained in the proposition of the company. And do hereby appoint, empower and commission W. H. H. Cowles, of Wilkes county, as our
50 legal and authorized agent and proxy for us, and in our stead, and for the county to subscribe on the books of the Northwestern North Carolina Railroad Company the said sum of one hundred thousand dollars, to be paid on the conditions of the completion of said road, as expressed in the proposition of the railroad company, as hereinafter set forth.

We further order that bonds with coupons in sums not less than one thousand dollars nor more than five thousand *b*ollars, payable not less than ten nor more than forty years after date (the amount of the bonds and the time they are to run to be hereafter agreed upon between us and the railroad company), with interest at six per cent., semi-annually (the bonds to be on interest only from time of their delivery), be prepared to be issued and signed by us.

We further order and adjudge Jesse T. Ferguson is to receive said bonds when issued, and to hold the same in trust, and to deliver one-third of said bonds to the railroad authorities when the railroad is completed and the trains running to a point half way between Elkin, in Surry county, and Wilkesboro, in Wilkes county, and the other two-thirds of the bonds to be delivered when the railroad is completed and the cars running to Wilkesboro, or a point just across the river and opposite said town.

And in case of a failure of the Richmond and Danville Railroad Company to complete the Northwestern North Carolina railroad, as heretofore agreed upon between them and the county of Wilkes, then said trustee must surrender up all the bonds in his hands to us to be cancelled.

It is further ordered, that for the purpose of meeting the interest on said bonds and the principal when it falls due, the county commissioners shall have power each year to levy and correct a sufficient amount of taxes for the purpose required.

It is further ordered, that before the trustee shall deliver one-third of the bonds, the Northwestern North Carolina Railroad Company shall issue to the county of Wilkes thirty-three and one-third thousand dollars' worth of stock in their railroad; and when the

other two-thirds of the bonds are delivered the said railroad company shall issue sixty-six and two-thirds thousand dollars' worth of stock to said county.

RUFUS W. COLVARD,
Chairman Board of Commissioners.
J. A. COOPER,
County Commissioner.
J. S. HOLBROOK,
County Commissioner.

51 EXHIBIT "B."

Whereas a petition in accordance with law has been presented us, asking that an election be ordered in the county of Wilkes on the 6th day of November, 1888, for the purpose of submitting to the people the proposition to subscribe one hundred thousand dollars, payable in Wilkes County bonds, to the capital stock of the Northwestern North Carolina Railroad Co., it is now ordered by us, the commissioners of Wilkes county, that an election be held the 6th day of November, 1888, and that a vote be taken at the different precincts in the county of Wilkes as to whether they will subscribe one hundred thousand dollars to the capital stock of the railroad aforesaid. Those favoring said subscription voting a written or printed ticket with the word "Subscription." Those opposed, "No subscription."

It is further ordered, in accordance with the provision submitted to us by the Northwestern North Carolina Railroad Company for the extension of the Northwestern North Carolina railroad, that in case that a majority of the qualified voters of Wilkes county shall vote for said subscription the commissioners shall issue bonds payable to the Wachovia National Bank of Winston, N. C., to run not less than ten nor more than forty years (as the commissioners shall deem best) after date said bonds bearing interest at six per cent. per annum, payable semi-annually, said bonds to be placed in the hands of a trustee, to be selected by the commissioners, and one-third of the bonds to be delivered to the railroad authorities when the railroad is constructed and the cars running to a point one-half the distance between the Surry County line and Wilkesboro, in the county of Wilkes. And the remaining sixty-seven thousand dollars on completion of the road and the running of the train to the town of Wilkesboro or a point across the river, within one mile of the courthouse; said bonds to be in denominations of one thousand dollars each, interest to be paid on said bonds only from the time of their delivery.

It is further ordered, in accordance with the provisions submitted to the commissioners by the Northwestern North Carolina railroad, that the railroad company shall continue work on said road in the county of Wilkes until it shall have been completed, which shall be by the 16th of September, 1890. And, upon the failure of the said road to complete their line from Winston to Wilkesboro, as herein provided, then said subscription issued shall be null and void, and

the railroad company shall have no right to demand the un-
52 earned bonds issued by the county, but the trustee, in whose hands the bonds are, shall deliver them up to the county commissioners to be cancelled. And the said railroad company shall issue and deliver to the county of Wilkes, certificates of stock in the Northwestern North Carolina railroad to the amount of bonds received at the time of the delivery. The said election shall be held under the same provisions, laws and regulations as in the case of a regular State or county election. The above order is made at the request of the Northwestern North Carolina Railroad Company, and with their full concurrence.

Whereas, the Northwestern North Carolina Railroad Company have presented to the board of county commissioners of Wilkes county, a petition signed by the requisite numbers of citizens, asking the board of county commissioners of Wilkes county to subscribe one hundred thousand dollars to the capital stock of the Northwestern North Carolina Railroad Company; and at their regular meeting of said county commissioners of Wilkes county, held at the court-house in Wilkesboro, N. C., on the first Monday in October, 1888. and upon consideration of said petition, it is ordered by the board that one hundred thousand dollars be subscribed to said Northwestern North Carolina Railroad Company, subject, however, to be ratified by the qualified voters of Wilkes county, at an election to be held on the 6th day of November, 1888. And the Northwestern North Carolina Railroad Company, through A. B. Andrews, president of said company, covenants and agrees, to and with the said board of county commissioners of Wilkes county, to wit: R. W. Colvard, chairman; J. A. Cooper and J. S. Holbrook, that in case said Northwestern North Carolina Railroad Company do not comply with the terms of a certain order made at this court, to wit: that said railroad company agrees to construct and build a railroad from Winston, N. C., to Wilkesboro, N. C., and to have said road in running operation, properly equipped, to Wilkesboro, N. C., or to within one mile of the court-house, across the river, by the 16th day of September, 1890; that the said Northwestern North Carolina Railroad Company will forfeit and pay to said commissioners of Wilkes county, the sum of ten thousand dollars, provided that said subscription of one hundred thousand dollars shall be legally voted and subscribed to the capital stock of said railroad company. The ten thousand dollars forfeiture is to be placed in the Wachovia National Bank of Winston, N. C., to be held in trust for the use of Wilkes county, N. C., and to be turned over to the said county commissioners of Wilkes county, N. C., in case said Northwestern
53 North Carolina Railroad Company shall fail to complete said railroad, as hereinbefore stated. In case the depot be situated on the east side of Reddie's river, the railroad company obligates themselves to erect at their expense a good, substantial bridge over Reddie's river for the purpose of transporting teams, wagons, etc., and the said bridge to be built whenever the commissioners designate. The county commissioners obligate themselves to furnish a good public road to and from the said bridge to the depot. The

said bridge to be turned over to the county and to be kept forever afterwards as a public bridge; said bridge to be built within sixty days from the completion of the railroad to the point intended as a depot. It is expressly understood and agreed between the said county commissioners and the said railroad company that if a majority of the qualified voters of Wilkes county vote for the subscription of one hundred thousand dollars, as provided for in this election, to be held November 6, 1888, *is* subscribed by the county commissioners and ratified by the voters, then the obligations heretofore entered into with the Richmond and Danville Railroad Company shall be null and void, otherwise, it shall remain in full force till the expiration of time specified in the first agreement, made on May 3, 1887, with the Richmond and Danville Railroad Company.

R. W. COLVARD,
Chairman Board of Commissioners.
J. A. COOPER, *County Commissioner.*
J. S. HOLBROOK, *County Commissioner.*
NORTHWESTERN N. C. R. R. CO.,
By A. B. ANDREWS, *President.*

NORTH CAROLINA, }
Wilkes County, }

It appearing to the satisfaction of the board of county commissioners of Wilkes county according to the board of county canvassers, that there are four thousand one hundred and eighty-two qualified voters in Wilkes county, and that at the election ordered by us to be held on the 6th day of November, 1888, to subscribe "one hundred thousand dollars" to the capital stock of the Northwestern
54 North Carolina Railroad Company, two thousand seven hundred and sixty-two votes were cast for said propositions, according to the conditions, stipulation and agreements contained in said proposition; and this being a majority of the qualified voters in Wilkes county:

Now, therefore it is hereby adjudged by the board that said proposition is properly ratified according to said contracts and agreements heretofore entered into between said railroad company and this board.

APRIL 1, 1889.

Ordered by the board, that the one hundred thousand dollars subscribed to the Northwestern North Carolina Railroad Company at October term, 1888, at the commissioners' court of Wilkes county, and ratified by the voters of Wilkes county at an election ordered by and held November the 6th, 1888, be paid in bonds of the denominations of one thousand dollars each, bearing interest payable semi-annually, at the Wachovia National Bank of Winston, N. C., from the time of their delivery, as set forth in the agreement entered into between the commissioners of Wilkes county and A. B. Andrews, president of the Northwestern North Carolina Railroad Company, at October meeting, 1888, the principal of which bonds shall become due and payable as follows, to wit: three thousand dollars thereof

shall become due and payable eleven years after their delivery to the said Northwestern North Carolina Railroad Company, and five thousand thereof become due and payable each and every year thereafter, till the thirtieth year, there shall be paid the seven thousand dollars still remaining due.

It is further ordered by the board that R. W. Colvord is hereby authorized and empowered to contract with any company he may deem best to have properly lithographed the bonds which are to issue, with coupons attached, providing for the payment of said interest semi-annually, as set forth in the contract made at October term, 1888, of this court.

JUNE 2, 1889.

Whereas, on the 1st day of October, 1888, the board of commissioners of Wilkes county entered into a contract with the Northwrstern North Carolina Railroad Company to issue one hundred thousand dollars of county bonds to aid in the construction and extension of said Northwestern North Carolina railroad; and, whereas, the further condition of said contract provides that "one-third" of the bonds are to be delivered to said railroad authorities when
55 the railroad is constructed and the cars running to a point one-half the distance between the Surry County line and Wilkesboro, in the county of Wilkes; and it appearing to us by the affidavit of A. B. Andrews, president of the Northwestern North Carolina Railroad Company, and C. F. Botton, chief engineer of said company, that the above condition and provision has been complied with, and the board here finding as a fact that the same is true:

It is now ordered by the board of commissioners that thirty-three thousand dollars of bonds, face value, numbered from one to thirty-three (1 to 33), inclusive, be signed and delivered at once to said A. B. Andrews, president of the said Northwestern North Carolina Railroad Company, and take his receipt therefor.

It is understood and agreed here between the parties to the contract, all being present, that the interest on the bonds shall run only from the 1st day of June, 1890, but it is further agreed between the parties that before the delivery of said bonds that the board of commissioners may cut off from the first eleven bonds the coupons due October 1, 1890, leaving the October 1, 1890, coupons on the other twenty-two bonds, which will be the same as if the fractional part of the amount due on all the October coupons, 1890, were paid by the county at maturity.

And it is further ordered by the board of commissioners of Wilkes county that when said railroad shall be completed to Wilkesboro, or to a point within one mile as stipulated in the agreement, entered into between the board of commissioners of Wilkes county and the Northwestern North Carolina Railroad Company, at the meeting of said board on the 1st day of October, 1888, as aforesaid, and when the proper affidavits shall be filed as to said completion, according to the contract, then the chairman of this board is hereby directed to execute and sign the remaining sixty-seven thousand dollars of bonds, and deliver the same to A. B. Andrews, president of said

Northwestern North Carolina Railroad Company, and take his receipt for the same; and to receive from said A. B. Andrews, president, as aforesaid, the certificate of stock for Wilkes county.

It is further ordered by the board, that R. W. Colvard, chairman of the board, is authorized and empowered to agree with A. B. Andrews, president of the Northwestern North Carolina Railroad Company, as to what number of coupons are to be delivered in case said bonds are delivered at a time other than when said coupons are due, so that the matter of equitable adjusting the interest on said
56 bonds may be arranged *arranged* the county of Wilkes and said railroad authorities, said interest to run only from said completion of the railroad.

NORTH CAROLINA, }
Wilkes County. }

I, E. M. Blackburn, register of deeds for Wilkes county, do hereby certify that the foregoing is a true copy of the proceedings of the county commissioners of Wilkes county in reference to the Northwestern North Carolina Railroad Company, from May 3d, 1888, to December 31st, 1890, as appears on record in my office.

This February 14, 1898.

(Signed) E. M. BLACKBURN,
Register of Deeds.

EXHIBIT No. 1.

Six per Cent Bond.

(Copy.)

The County of Wilkes, State of North Carolina, is indebted to the bearer in the sum of one thousand dollars, lawful money of the United States, payable on the first day of October, 1913, with interest thereon from the first day of October, A. D. 1889, at six per cent. per annum, payable on the first days of April and October in each year, at Wachovia National Bank, of Winston, North Carolina, on presentation and surrender of the respective coupons hereto attached, as they severally become due and payable.

This bond is one of a series on one hundred bonds of the denomination of one thousand dollars each, issued by authority of an act of the General Assembly of North Carolina, ratified the 20th day of February, A. D., 1879, entitled "An act to amend the charter of the Northwestern North Carolina railroad for the construction of a Second division from the towns of Winston and Salem, in Forsyth county, up the Yadkin valley, by Wilkesboro, to Patterson's factory, Caldwell county," and authorized by a vote of a majority of the qualified voters of Wilkes county, by an election regularly held for that purpose on the 6th day of November, A. D., 1888, and by an order of the board of commissioners of Wilkes county made on the first day of April, A. D., 1889. This series of bonds is issued to pay the subscription of one hundred thousand dollars made to the capi-

tal stock of the Northwestern North Carolina Railroad Company by said county of Wilkes.

In witness whereof the chairman of the board of county commissioners and the clerk of the said board have hereunto subscribed their names, and the said clerk has affixed the seal
57 of said board of commissioners, this 1st day of October, A. D., 1889.

(Signed) R. W. COLVARD,
Ch'm'n Board of Commissioners of Wilkes Co.

(Signed) J. M. ADAMS,
[SEAL] *Clerk Board Commissioners Wilkes Co.*

Answer.

The defendant, Clarence Call, sheriff of Wilkes county, answering the complaint of the plaintiffs, says:

I. That the allegations of paragraph one of the complaint are true.

II. That the allegations of paragraph two of the complaint are true.

III. That the allegations of paragraph three of the complaint are true.

IV. That the allegations of paragraph four of the complaint are true.

V. That the allegations of paragraph five of the complaint are untrue, as he is advised.

VI. That the allegations of paragraph six of the complaint are untrue, in so far as it is alleged that, after the passage of the laws therein referred to, no county in the State, nor the citizens of any county in the State, had any pecuniary interest in said Northwestern North Carolina Railroad Company, but, on the contrary, the county of Forsyth, and the citizens of the county of Forsyth, and of other counties in the State, had stock in said Northwestern North Carolina Railroad Company, until the year 1895, when the road was sold to the Southern Railway Company.

VII. That the allegation that the General Assembly of North Carolina, at its session of 1872 and 1873, amended the charter of the Northwestern North Carolina Railroad Company is true, and it may be true, except as hereinafter stated, that no amendment of the charter of said company, prior to February 20th, 1879, granted authority to any county to subscribe stock to said road; but, the allegation that prior to February 20th, 1879, the county of Wilkes had no authority to subscribe stock to said company is, as this defendant is advised, untrue, and it is also untrue that this company had no authority to build a railroad into the county of Wilkes.

58 VIII. That as to the allegations of article eight of the complaint, the defendant admits that the act of 1879 was passed; and he admits that the ayes and nays on the second reading in the house of representatives do not appear as having been entered on the Journal of the House, according to the published volume of the Journal, but this defendant has never seen the original Journal, and he demands proof of said allegation.

IX. That as to the allegations of paragraph nine of the complaint, the defendant admits that an election was held, but the defendant denies that said election was held without authority, except that said vote, by an oversight, was taken upon a contract with the Richmond and Danville Railroad Company instead of the Northwestern North Carolina Railroad Company; and said election was for that reason abandoned, and a new election ordered.

X. That as to the allegations of paragraph ten of the complaint, the defendant admits that the results of the election were abandoned for the reasons set forth in paragraph nine of this answer.

XI. That as to the allegations of paragraph eleven of the complaint, the defendant admits that the election was held, and that a majority of the qualified voters of the county cast their ballots in favor of the subscription of one hundred thousand dollars to the said Northwestern North Carolina Railroad Company, but the defendant cannot say whether Exhibit "B" is a full transcript of the proceedings or not. That the other allegations in said paragraph are untrue, but the defendant avers that the election was legally held; that the board of commissioners were fully authorized, as he is advised, to order said election, and to make the subscription to the road, and to issue the bonds, under the original charter of the road, passed by the convention of North Carolina in March, 1868; and by virtue of authority conferred by sections 1896 and 2000, inclusive, of the Code of North Carolina.

XII. That as to allegations in paragraph twelve of the complaint, it is true that the board of commissioners issued the one hundred thousand dollars of bonds, and have levied a tax annually, to pay the interest on said bonds.

XIII. That it is true that the defendant has some funds on hand, as treasurer, to be applied on coupons that fall due in April and October, 1897, and money is in his hands to be applied in payment of coupons yet to fall due.

59 XIV. That it is true that said Call has been in the habit of paying said coupons, without any special order of said plaintiff board, but these payments were made by the consent and direction of the plaintiff board, and it was well understood between the said board and this defendant that these coupons should be paid by this defendant whenever he had the funds in hand.

That the plaintiff board levied a special tax to pay certain coupons for 1893 and 1894, which long remained unpaid, and certain bondholders, through their agent or agents had many times presented their coupons for payment, and this defendant did agree with said agent or agents to notify them when he should be in funds to pay the same; and this defendant did so notify said agent or agents, as soon as he came into possession of sufficient funds, to pay off these coupons, amounting to two thousand one hundred dollars, and this defendant did so pay them off. That this defendant has made no payments of coupons since this restraining order was served on him.

And for further defence, the defendant says:

1. That the Northwestern North Carolina Railroad Company was

chartered by an ordinance of the constitutional convention of North Carolina; that said ordinance was ratified the 9th day of March, 1868, and was published as chapter 17 of the ordinances of said convention, and a copy of said ordinance is hereto attached and marked Exhibit "A." That section two of said ordinance reads as follows: "Be it further ordained, that the capital stock of said company may be created by subscriptions on the part of individuals, corporations, and counties, in shares of one hundred dollars each." That section twelve of said ordinance reads as follows: "Be it further ordained, that the stockholders of said company may pay the stock subscribed to them, either in money, labor or material for constructing said road, as the board of directors may determine, and that all counties and towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations, and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic (Atlantic and North Carolina) Railroad Company for the government of such towns and counties as now allowed to subscribe to the capital stock of said company." That section thirteen of said ordinance reads as follows: "Be it further ordained, that the company shall have power to construct branches of said railroad, one of which shall run from said towns of Winston and Salem by way of Mt. Airy, in Surry county, to the line of the State of Virginia." That the provisions setting
60 forth the manner in which the towns and counties shall subscribe to the stock of the Atlantic and North Carolina Railroad Company are contained in sections 33 to 37, inclusive, of chapter 136 of the Laws of the General Assembly, session of 1852, a copy of which sections is hereto attached, and marked Exhibit "B."

II. That by virtue of said ordinance, the Northwestern North Carolina Railroad Company was organized on April 17, 1868. That in April 1868, the county of Forsyth, by virtue of the provisions of said ordinance, voted a subscription of one hundred thousand dollars to said railroad company, and said county issued bonds in payment of said subscriptions, the validity of which bonds has been upheld by the supreme court of North Carolina in the cases of Hill *vs.* Commissioners of Forsyth County, 67th N. C., page 367, and of Belo *vs.* Commissioners of Forsyth County, 76 N. C., 489.

III. That the work of grading the road-bed of said railroad began under the supervision of Edward Belo, now dead, the president of said railroad company, in the month of October, 1868, and continued all through the winter of 1868 and 1869; and by April 10th, 1869, considerable grading had been done on said railroad, seventy-five to one hundred and fifty hands having been employed during the winter on said work; and this defendant is advised that the Northwestern North Carolina railroad was an unfinished road on said 10th day of April, 1869 (1869).

IV. That the county of Forsyth had stock in said railroad company to the extent of seventy-five thousand dollars, and many citizens of the county of Forsyth, Guilford and other counties in the State, held stock in said company, from or soon after the organization of the company in 1868 to the year 1895.

V. That sections 1996 to 2000, inclusive, of the code were first enacted on the 10th day of April, 1869, and were intended, as set forth in the title to the act, "to authorize the several counties of the State to take stock in railroad companies," the act being published as chapter 171 of the Laws of 1868 and 1869. That this act was brought forward in Battle's Revisal as sections 66 to 70, inclusive, of chapter 99, and was also brought forward in the Code of North Carolina, ratified as one act, on March 2d, 1883.

VI. That this defendant is advised that the bonds of one hundred thousand dollars, issued by the board of commissioners
61 of Wilkes county, as aforesaid, were legally issued and were authorized by the provisions of the original charter, granted by the convention on March 9th, 1868, before the ratification of the present constitution, and that the power being given by said ordinance of said convention, the method of making said subscription is pointed out in sections 1996 to 2000, inclusive, of the code, the board of commissioners of said county of Wilkes being the successors in office of the board of justices and of the county court, existing before the adoption of the constitution in 1868.

That the election held on November 6th, 1888, was held in accordance with the provisions of the sections 1996 — 2000, inclusive, of the Code of North Carolina. That the defendant is informed that none of the bonds of the county of Wilkes, issued in aid of the completion of said Northwestern North Carolina railroad, are now held by said railroad company, but all of them are held by *bona fide* holders for value; and this defendant is advised that any irregularities in the method of holding said election, if any such did exist, would not in any way affect the validity of said bonds in the hands of *bona fide* purchasers for value.

VII. That the defendant is further advised that said board of commissioners was authorized to issue said bonds by virtue of the provisions of sections 1996 to 2000, inclusive, of the Code of North Carolina, which sections were first enacted on April 10, 1869. That the Northwestern North Carolina railroad was an unfinished or incomplete road on April 10, 1869, was such an unfinished and incomplete road on January 1, 1874, when the provisions in Battle's Revisal took effect; and was such an unfinished and incomplete road on November 1, 1883, the date on which the provisions of the Code of North Carolina took effect.

VIII. That the construction of the Northwestern North Carolina railroad from Greensboro, N. C., to Winston and Salem, N. C., was finished about the year 1872, and has since been operated as a railroad line, and freight and passenger trains have been run over the line of the same between Greensboro and Winston and Salem, a distance of some twenty-nine miles. That in 1887 the work of constructing the road and of grading the road-bed between Winston and Wilkesboro, in Wilkes county, was begun, and the said work of grading the said road-bed was continued until the work was completed, in the year 1890. That on the 6th day of November, 1888, the said railroad between the towns of Winston and Wilkes-

boro was an unfinished railroad, the work of constructing the
62 said railroad between said towns having not been finished, but the same being in an unfinished condition, many miles of the line between Winston and Wilkesboro being then unfinished.

IX. That the General Assembly of North Carolina, at its session in the year 1881, passed an act, which is published as chapter — of said laws, which authorizes the said Northwestern North Carolina Railroad Company to extend its road and to build branches; and said act provided for subscriptions by counties, cities and towns and townships, a copy of which act is hereto attached and marked Exhibit "C."

X. That the General Assembly of North Carolina, at its special session in 1868, passed an act ratifying the charter of the said railroad, published as act — of said acts, a copy of which is hereto attached and marked Exhibit "D," which is specially pleaded by this defendant.

Wherefore, the defendant prays that the restraining order heretofore granted be dissolved; that this action be dismissed, and the defendant recover the costs, and for such other and further relief as he may be entitled to.

(Signed) CLARENCE CALL,
Sheriff and Treasurer.

Clarence Call, being duly sworn, says: That the contents of this answer are true of his own knowledge, except as to matters stated on information and belief, and these he believes to be true.

(Signed) CLARENCE CALL.

Sworn to and subscribed before me, this January 28th 1898.

(Signed) H. R. STARBUCK,
Judge Superior Court.

EXHIBIT "A."

CHAPTER XVII.

An ordinance to incorporate the North Carolina Railroad Company.

SECTION 1. Be it ordained by the people of North Carolina in convention assembled, and it is hereby ordained by authority of the same, That for the purpose of constructing a railroad of one or more tracks, from some point on the North Carolina railroad, between the town of Greensboro, in Guilford county, and the town of
63 Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the State, to be hereafter determined, a company is hereby incorporated under the name and style of the Northwestern North Carolina Railroad Company, with a capital stock of two millions of dollars, which shall have a corporate existence as a body politic for the space of ninety-nine years, and by that name may sue and be sued, plead and be impleaded, in any court of law and equity in the State of North Carolina; and may

have and use a common seal, and shall be capable in law and equity of purchasing, holding, leasing and conveying estates, real and personal, and mixed, and acquiring the same by gift or devise, so far as may be necessary for the objects herein contemplated, and no further; and said company may enjoy all other rights and immunities which other corporate bodies may lawfully exercise, and may make all necessary by-laws and regulations for its government not inconsistent with the constitution and laws of the State of North Carolina and of the United States.

SEC. 2. Be it further ordained, That the capital stock of said company may be created by subscriptions on the part of individuals, corporations and counties, in shares of one hundred dollars.

SEC. 3. Be it further ordained, That books of subscription to the capital stock of said company shall be opened by the following commissioners, to wit: I. G. Lash, J. A. Vogler, H. W. Fries, in the town of Salem; and Thomas J. Wilson, Joseph Masten, R. A. Wilson, in the town of Winston, and by such other persons, and in such other places as the aforesaid commissioners may direct: and that ten days' notice of the opening of said books shall be given in one or more newspapers of this State; and, furthermore, that the said commissioners, or any four of them, may, at any time after said books have been kept open for the space of thirty days, and the sum of thirty thousand dollars has been subscribed to the capital stock of said company, and five per cent. paid thereon, have power to call together the subscribers to said stock for the purpose of completing the organization of said company; and the said subscribers shall be, and are hereby declared incorporated into a company by the name and style of the Northwestern North Carolina Railroad Company; and the said company may, from time to time, receive other subscriptions to its capital stock as it may deem proper.

64 SEC. 4. Be it further ordained That the company may hold annual meetings of its stockholders, and oftener if necessary, and at its organization and the annual meetings subsequent thereto, ten directors shall be elected to hold office for one year, or until their successors shall be elected; and any of said meetings shall have power to make or alter the by-laws of the company: Provided, that in all such meetings of the stockholders a majority of all the stock subscribed shall be represented in person or by proxy, which proxy shall be verified in the manner prescribed by the by-laws of the company; and each share thus represented shall be entitled to one vote on all questions; and, that it shall be the duty of the directors of the company to elect one of their own number as president of said company, and to fill all vacancies in their board.

SEC. 5. Be it further ordained That, after the organization of said company, and election of the president, and other necessary officers, the officers so elected shall proceed, under the advice of the directors, to locate the eastern terminus of the Northwestern North Carolina railroad, and shall proceed to construct said road, with one or more tracks, as speedily as practicable, in sections of five miles each, to the towns of Winston and Salem, in Forsyth county, which portion of said railroad, when completed, shall constitute its

First division: Provi-ed, that if the distance from the nearest section to the towns of Salem and Winston be less than five miles, the same shall be considered a section.

SEC. 6. Be it further ordained That said company shall have the same power to call for and enforce the payment of stock subscribed as was heretofore granted to the North Carolina Railroad Company by their charter of incorporation; and shall have power to condemn land for the use of the company, when a contract of purchase cannot be made with the owner thereof, to the same extent, and in the same manner, and under the same rules, regulations and restrictions, as the said North Carolina Railroad Company were authorized to do by their act of incorporation.

SEC. 7. Be it further ordained That, all contracts made and entered into by the president or superintendent of the company, whether with or without seal, shall be binding upon the company; and the president shall, under the instruction of the board of directors, issue certificates of stock to the stockholders, which shall be transferable in the manner prescribed by the by-laws of the company.

SEC. 8. Be it further ordained That whenever the president and chief engineer of said company shall certify to the governor
65 of the State that the grading of any of the sections of said road, as mentioned in section 5 of this ordinance, is completed and ready for the superstructure, he shall direct the public treasurer of the State to loan in behalf of the State to the said company the sum of fifty thousand dollars in coupon bonds; and in like manner the governor will direct similar loans to be made to the company, upon the completion of the grading of each and every section, until the First division is graded entire; and said company shall set aside the receipts of the road over and above its annual expenses, as a sinking fund to pay the said debts and interest, the whole amount of said debt and interest to be paid before the said company shall order any dividends on the stock of the company; and that said sinking fund so produced shall be semi-annually paid into the public treasury.

SEC. 9. Be it further ordained That no part of said loan or bonds shall be delivered to said company until the president and directors thereof shall execute and deliver to the governor of the State a mortgage on the entire road and its property, conditioned to save the State harmless against the loss of both principal and interest of said loan.

SEC. 10. Be it further ordained That the coupon bonds loaned, as aforesaid, shall be signed by the governor, countersigned by the treasurer and sealed with "the great seal of the State," bearing six per cent. interest, the principal payable at the end of thirty years from the date thereof, and the coupons for the interest payable semi-annually in such form as the public treasurer may direct.

SEC. 11. Be it further ordained, That the company may have the exclusive right of transporting persons and freight upon said road at such rates of charges as the board of directors may fix, and may

have power to farm or lease the same to any person or persons or corporation.

SEC. 12. Be it further ordained, That the stockholders of said company may pay the stock subscribed by them either in money, labor or material for constructing said road, as the board of directors may determine, and that all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company, for the government of such towns and counties as are now allowed to subscribers to the capital stock of said company.

66 SEC. 13. Be it further ordained, That the company shall have power to construct branches of said road, one of which shall run from said towns of Winston and Salem by way of Mount Airy, in Surry county, to the line of the State of Virginia.

SEC. 14. Be it further ordained, that this ordinance shall be in force from and after its passage.

Ratified this 9th day of March, A. D. 1868.

CALVIN J. COWLES, *President.*

T. A. BYRNES, *Secretary.*

EXHIBIT "B."

Chapter 136 of the Laws of North Carolina, session 1852.

SEC. 33. Be it further enacted That it shall be lawful for any incorporated town or county near or through which said railroad may pass to subscribe for such an amount of stock in said company as they shall be authorized to do by the inhabitants of said town or the citizens of said county, in manner and form as hereinafter provided.

SEC. 34. Be it further enacted That the corporate authorities of such town, of the justices of the peace of such county, a majority of the justices of the county concurring, *to* make an order requiring the constable of such town and the sheriff of such county, at such time and on such notice as they shall direct, to open a poll and take the sense of the voters of such town qualified to vote for town officers, and of the voters of such county qualified to vote for members of the House of Commons of the General Assembly, whether the officers of said town and the justices of the peace of said county shall subscribe to the stock of such company for such sum as the order shall propose, and the constable shall make return of the number against it, and the sheriff shall, in like manner, make return as to the vote in his county to the first court thereafter, to be held for such county and it shall be the duty of the sheriff to notify each justice of said county to attend at the courthouse to which he may make his returns of said poll.

SEC. 35. Be it further enacted That if upon the return of such constable and of such sheriff it shall appear that a majority of the qualified voters of such town, and by the return of

67 the sheriff that a majority of the qualified voters of such county voting upon the question are in favor of the sub-

scription, the corporate authorities of such town and the justices of such county shall appoint an agent to make the subscription in behalf of such town and county, to be paid for in the bonds of such town and county, and on such time as shall be agreed on by said town officers and the justices of such county.

SEC. 36. Be it further enacted That for the purpose of paying the quotas on said stock as may be called for or the installments of such subscriptions as may fall due, the town authorities and the justices of the county shall have power to appoint an agent or agents to negotiate a loan or loans for and in the name of such town and county; and it shall be the duty of the authorities of such town and the justices of such county to levy such taxes annually on the persons, lands and other personal property within such town and county as may be sufficient to pay the amount of such loan or loans and the interest thereon, and as said town authorities and the justices of such county shall deem necessary and proper, and to make such order or orders as shall be deemed necessary for the due collection and payment of the same; and the stock subscribed on behalf of such town and county shall stand pledged for the payment of the loan thus authorized to be contracted.

SEC. 37. Be it further enacted, That the right to the stock in the company hereby authorized to be subscribed, shall vest in the town and county making such subscriptions; and the corporate authorities of said town and the justices of such county shall have power from time to time to appoint a proxy to represent the stock in the meeting of the stockholders of the company, and also an agent to collect the dividends of such stock, and when collected, to apply the same to payment of the bonds and interest negotiated as aforesaid.

EXHIBIT "C."

An act to authorize the Northwestern North Carolina Railroad Company to extend its road and to build branches thereof.

The General Assembly of North Carolina do enact:

SECTION 1. That it shall be lawful for the Northwestern North Carolina Railroad Company to extend and construct its line of road, or a branch thereof, to commence at or near Winston, in the
68 county of Forsyth, through the counties of Forsyth, Davidson, Yadkin, Davie, Rowan, and Iredell, or any or either of them, to Statesville, or some other point on the Western North Carolina railroad, and may build and operate additional branches thereto, or from its present main line to any important mines or manufactories in any of said counties, or counties, adjacent to them; provided, that nothing contained in this act shall operate to be construed so as to prevent or interfere with the construction of the North Carolina extension of the Virginia Midland railroad from Danville, Virginia via Winston, Forsyth county, and Mocksville, Davie county, to some point on the Atlantic, Tennessee and Ohio railroad in Iredell county; but said company is hereby authorized to build said road under the organization and consolidation hereto-

fore made by the stockholders and directors of the consolidated line composing the North Carolina extension.

SEC. 2. That to provide the means in whole or in part for this purpose, the said company may receive subscriptions in money, labor, property, or otherwise, as the said company may agree, and may mortgage or otherwise pledge its property and franchises and the work constructed, or to be constructed, with the franchises and rights connected therewith.

SEC. 3. That any corporation, county, city, town, or township interested therein, may subscribe to stock for said purpose, or otherwise contribute to such work in such manner and in such amount as shall be determined by the proper authorities of such corporation, county, city, town, or township, and agreed on with the said Northwestern North Carolina Railroad Company.

SEC. 4. This act shall be in force from and after its ratification.

In the General Assembly, read three times, and ratified this the 2d day of March, A. D., 1881.

EXHIBIT "D."

An act ratifying and confirming the charter of the Northwestern North Carolina Railroad Company.

SECTION 1. The General Assembly of North Carolina do enact, that an ordinance, entitled "An ordinance to incorporate the Northwestern North Carolina Railroad Company," ratified the 9th day of March, A. D., 1868, be, and the same is hereby re-enacted, ratified and confirmed, and all acts and things heretofore done under the provisions of the said ordinance are hereby ratified and confirmed.

69 SEC. 2. That all the rights, powers and authorities conferred or purporting to be conferred by said ordinance, incorporating the Northwestern North Carolina Railroad Company, on the justices of the peace of Forsyth county, or of the county court of said county be, and the same are hereby, conferred on the commissioners of said county.

SEC. 3. That the commissioners of the county of Forsyth are hereby invested with full powers and authority to levy from time to time such tax as may be sufficient to pay the subscription made by said county to the capital stock of the Northwestern North Carolina Railroad Company, and any interest due thereon, or to liquidate any debt created by said county in borrowing money to pay such subscription stock.

Ratified the 11th day of August, A. D., 1868.

Replication.

Replying to the new matter set up in defendant's answer, the plaintiff says:

1. The plaintiffs admit that the Northwestern North Carolina Railroad Company was chartered by an ordinance of the constitu-

tional convention of 1868, which is published as chapter XVII of the ordinances, passed by said convention, and that the section- of the charter of the Atlantic and North Carolina Railroad Company, referred to in section 12 of said ordinance are those mentioned in the answer.

2. That plaintiffs have no knowledge, information or belief as to whether the company was organized as alleged or whether the county of Forsyth voted a subscription as alleged in section 2 of said new matter, and are advised that the validity of the bonds in controversy in this action is in no way dependent on the validity of any bonds that may have been issued in payment of said subscription, if any such were issued, as to which plaintiffs have no information on which to form knowledge or belief, and demand for strict proof.

3. Plaintiffs have no knowledge, information or belief as to whether any work was done on the present line of the Northwestern North Carolina railroad, lying between Greensboro and Winston, prior to the 10th of April, 1869, but deny that any grading had been done prior to said date, west of the original terminus of the division of Winston prior to said date, and aver that the portion of the line of said railroad lying between Winston and Wilkesboro, in
70 Wilkes county, N. C., is a new branch of said railway company, constructed under the requirement of the act referred to in the pleading as ratified on the 20th day of February, 1879; and that said branch was not on the 10th day of April, 1869, or prior thereto, a part of an unfinished line.

4. That plaintiffs have no knowledge, information, or belief as to whether the counties of Forsyth, Guilford or other counties in the State held stock as alleged in fourth section of said new matter; and the plaintiffs aver that the citizens of the county of Wilkes had no pecuniary interest, nor any other interest except such as they had in common with all citizens of North Carolina in the Northwestern North Carolina Railroad Company on the 10th day of April, 1869, or at any time prior thereto, or subsequent thereto until after the 6th day of November, 1888. And that they had had no pecuniary interest in said company or its road up to the time this action was brought, except such as purported to have arisen out of an exchange of the bonds of Wilkes county for those shares of stock in said company.

5. That plaintiffs admit that sections 1996 to 2000, inclusive, of the code, are in terms the same as chapter 171 of the Laws of 1868–1869, but deny that the bringing forward of said act in the compilation known as Battle's Revisal, had any effect in contemplation of law, the said revisal never having been lawfully enacted as a statu-e; nor as to the time when said company was organized, and demand strict proof.

6. In reply to section 6, contained in the new matter of defendant's answer, plaintiffs deny all allegations contained in said section, except the allegation that the bonds are not held by said railroad company, but by *bona fide* holders for value, as to which plaintiffs have no knowledge or sufficient information to form a belief, and therefore deny, except a legal proposition therein stated, and predi-

cated upon said last-named allegation of fact, and plaintiffs are advised that they are not required to swear to any proposition of law.

7. Replying to the seventh section of the new matter contained in defendant's answer, plaintiffs deny that the board of commissioners of Wilkes county had at the time of issuing the one hundred thousand dollars of bonds in controversy, any authority in law to issue the same or deliver them as a binding contract on the county of Wilkes. Plaintiffs deny that the Northwestern North Carolina railroad, located between Winston and Wilkesboro, was an unfinished or incomplete road on the 6th day of November, 1888, or at
71 any time prior thereto, and plaintiffs are advised that no section of the compilation known as Battle's Revisal ever had the force and effect of a statute.

8. The plaintiffs have no knowledge or information or belief as to the time when the portion of said railroad, located between Greensboro and Winston, was completed or begun to be operated. Plaintiffs have no knowledge or information sufficient to form a belief as to the allegation *that* the work of grading and constructing the roadbed from Winston to Wilkesboro in 1887, but admits that some grading had been done between Winston and Wilkesboro before the end of the year 1887. But denies the conclusion of law that the portion of said railroad lying between Winston and Wilkesboro was an unfinished and incomplete road on November 6th, 1888.

9. It is not true that section 3, chapter 162 of the Laws of 1881, purports to enact, "That any corporation, county, city, town or township interested therein, may subscribe to stock for said purpose (of extending said line of the railroad) or otherwise contribute to such work in such manner as shall be determined by the proper authorities of such corporation, county, city or town or township, and agreed on with the said Northwestern North Carolina Railroad Company. But the said act failed to pass on its third reading in the house of representatives, as appears from a certified copy of the journal of said house, which will be offered in evidence.

Further replying to the new matter in section 14 of the defendant's answer, the plaintiffs say that they are informed and believe that the defendant made payment of interest and took up coupons on the bonds in controversy after the service of summons on him in this action, and plaintiffs aver, according to their information and belief, the defendant, when said payment was made, had information that it was the purpose of the plaintiffs to apply to the courts for an order restraining him from making further payments of the interest on said bonds.

A. C. AVERY,
FINLEY & GREEN,
T. J. DULA,
Attorneys for Plaintiff.

C. C. Wright, one of the plaintiffs above named, maketh oath that the facts set forth in the foregoing reply, as of his own knowledge, are true, and those stated on information and belief, he believes to be true.

C. C. WRIGHT.

72 Sworn to and subscribed before me, this the 29th day of January, 1898.

H. R. STARBUCK,
Judge Superior Court.

Transcript of Journals—Senate and House.

HOUSE OF REPRESENTATIVES,
TUESDAY, *January 14th*, 1879.

By Mr. York, a bill to amend the charter of the Northwestern North Carolina Railroad Company for the construction of a Second division from Winston and Salem, Forsyth county, up the Yadkin River valley by Wilkesboro to Patterson, Caldwell county.

Referred to the committee on railroads, post-roads, etc.

HOUSE OF REPRESENTATIVES,
SATURDAY, *January 18th*, 1879.

Mr. Vaughan, from the committee on railroads, post-roads, etc., reports on H. B. 103, a bill to amend the charter of the Northwestern North Carolina railroad, for the construction of a Second division from the towns of Salem and Winston, Forsyth county, up the valley of the Yadkin river, by Wilkesboro to Patterson, Caldwell county, recommending its passage, with the adoption of an accompanying amendment.

HOUSE OF REPRESENTATIVES,
MONDAY, *January 20th*, 1879.

On motion of Mr. York,

H. B. 103, a bill to amend the charter of the Northwestern North Carolina railroad, W. C. R. R., for the construction of a Second division from Winston, Forsyth county, up the Yadkin valley, by Wilkesboro to Patterson, in Caldwell county, is taken up for consideration.

The question is on the amendment suggested by the committee, and it is adopted; and as amended, the bill passes its second reading; and then, on motion of Mr. York, is referred to the committee on internal improvements, with order to be printed, and it is ordered by the house.

HOUSE OF REPRESENTATIVES,
THURSDAY, *January 30th*, 1879.

Mr. York, on the part of the committee of internal improvements, submits the following reports on ——; and,

73 H. B. 103, a bill to amend the charter of the Northwestern North Carolina railroad, etc., recommending its passage with amendments proposed.

HOUSE OF REPRESENTATIVES,
SATURDAY, *February* 1, 1879.

H. B. 103, an act to amend the charter of the Northwestern North Carolina railroad, etc., is taken up on its third reading.

Mr. York submits a new section to be added to the bill by way of amendment, which is accepted.

Mr. Richardson submits the following amendments, which is accepted.

"Provided, that nothing in this charter shall be construed to exempt said road from taxation."

Mr. Carter, of Buncombe, submits an amendment, which, after discussion, is withdrawn.

The question is then put on the amendments offered by the committee, and they are accepted; and the question recurs on the passage of the bill.

Mr. Powers sends forward the following amendment:

Amend by inserting in the proper place, "Provided, however, that any county, township, or other corporate authorities who shall issue any bonds or assume any obligations in behalf of this road shall be required to commence as soon as said obligations are assumed, to provide a sinking fund that shall be sufficient to liquidate said bonds or obligations at maturity."

Mr. Christmas sends forward the following amendment:

"Strike out in line 6 the words 'a person' and insert 'two persons in the eastern part of the State and one in the western part;' and insert in line 17 between the words 'toll' and 'who are not in any respect interested in said work.'"

The question is put on the amendment, and it is rejected.

Mr. Turner sends the following amendment:

Strike out "convict and convict labor wherever it occurs in the bill."

The question is put on this amendment and it is rejected; and the question recurs on the passage of the bill; and it passes by the following vote, and is ordered to be engrossed and transmitted to the Senate.

Ayes—Messrs. Amis, Anderson, Angier, Ardrey, Armstrong, Bateman, Burhod, Bingham, Bizzell, Blocker, Bonner, Bost, Brown of Yadkin, Brison, Buchan, Cale, Carter of Buncombe, Carter
74 of Yancey, Carrol, Carson, Clark, Colwell, Council, Covington, Davis of Haywood, Deans, Dickson, Dunn, Ellison, English, Etheridge, Ferrell, Foard, Foster, Fulcher, Goldston, Grant, Harrill, Harrison, Hewett, Hines, Holt, Jones, Johnson of Davie, Lamb, Leatherwood, Lockhart, Lowrie, Lutterlow, Meares, Miller, McLean, Normant, Oliver, Orchard, Packston, Pettipher, Powers, Rawley, Reed of Macon, Richardson of Columbus, Robertson, Smith, Taylor, Turner, Venable, Wheeler, Wimberley, York, Young—total ayes, 72.

Nays—Carter of Warren, Christmas, Henderson, Horton, Osborne, Wynne—nays, 6.

HOUSE OF REPRESENTATIVES,
THURSDAY, *February 20th*, 1879.

The committee on enrolled bills reports as correctly enrolled:

An act to amend the charter of the Northwestern North Carolina railroad, and for the construction of a Second division from the towns of Winston and Salem, Forsyth county, up *to* the Yadkin valley to and by Wilkesboro, Patterson's factory, Caldwell county.

SENATE CHAMBER, *February 4th*, 1879.

A message was received from the House, ——, transmitting for concurrence:

H. B. No. 103, S. B. No. 378, bill to amend the charter of the Northwestern North Carolina railroad for the construction of a division from the towns of Salem and Winston, up the Yadkin valley by Wilkesboro, to Patterson's factory, in Caldwell county.

Referred to the committee on internal improvements.

SENATE CHAMBER, *February 11th*, 1879.

From the committee on internal improvements:

By Mr. Brower, H. B. No. 103, S. B. No. 378, bill to amend the charter of the Northwestern North Carolina railroad, for the construction of a Second division from the towns of Winston and Salem, Forsyth county, up the Yadkin valley, by Wilkesboro, to Patterson's factory, Caldwell county, recommending it do pass.

75 *Calendar.*

On motion of Mr. Nicholson, H. B. No. 103, S. B. 378, bill to amend the charter of the Northwestern North Carolina railroad for the construction of a Second division from the towns of Winston and Salem, Forsyth county, up the Yadkin valley, by Wilkesboro, to Patterson's factory, in Caldwell county, was taken up on its second reading as passed—ayes 33, noes 5, as follows:

Those voting in the affirmative were:

Messrs. Alston, Black, Bledsoe, Brower, Bryan of Duplin, Bryan of Pender, Bull, Caldwell, Dancey, Davidson, Dortch, Eppes, Graham of Lincoln, Graham of Montgomery, Harriss, Henderson, Holleman, Hoyle, Leach, Lyon, Matheson, Merritt, Mitchell, Moye, Nicholson, Ormand, Redwine, Ross, Scales, Stuart, Taylor, Wardwell, Ward—33.

Those voting in the negative were:

Messrs. Alexander, Austin, King, Mebane, Williamson—5.

SENATE CHAMBER, *February 12th*, 1879.

H. B. No. 103, S. B. No. 378, bill to amend the charter of the Northwestern North Carolina railroad for the construction of a Second division for the towns of Winston and Salem, in Forsyth county, up the Yadkin valley by Wilkesboro to Patterson's factory, in Caldwell county, passed its third reading—ayes 35, noes 1, as follows:

Those voting in the affirmative were:

Messrs. Alston, Bledsoe, Brower, Bryan of Duplin, Bryan of Pender, Bull, Bynum, Caldwell, Dancey, Dortch, Eaves, Eppes, Erwin, Everett, Graham of Lincoln, Harris, Henderson, Holleman, Hoyle, King, Leach, Lyon, Matherson, Mitchell, Nicholson, Ormand, Redwine, Respass, Rose, Scales, Stuart, Taylor, Waddell, Waldo, Ward—35.

Mr. Williamson voted in the negative.

SENATE CHAMBER, *February 20th*, 1879.

The committee on enrolled bills reported as correctly enrolled:

H. B. 103, S. B. 378, an act to amend the charter of the Northwestern North Carolina railroad, and for the construction of a Second division from the towns of Salem and Winston, Forsyth county, up the Yadkin valley, by Wilkesboro, to Patterson's factory, Caldwell county.

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SENATE CHAMBER, *January 21st*, 1881.

Bills and resolutions were introduced, read the first time, and disposed of as follows:

By Mr. Tucker, S. B. 224, bill to authorize the Northwestern North Carolina railroad to extend its railroad, and to build branches thereof.

Referred to the committee on internal improvements.

SENATE JOURNAL, *January 25th*, 1881.

From the committee on internal improvements:

By Mr. York, S. B. 224, bill to authorize the Northwestern North Carolina railroad to extend its road, and to build branches thereof, recommending it do pass.

Calendar.

SENATE JOURNAL, *January 29th*, 1881.

Bills and resolutions upon the calendar were taken up and disposed of as follows:

S. B. 224, bill to authorize the Northwestern North Carolina railroad to extend its road, and to build branches thereof.

On its second reading, Mr. Scott, of New Hanover, moves the bill be postponed until Thursday next. Lost.

Bill then passed its second reading—ayes 26, noes as follows:

Those voting in the affirmative were:

Messrs. Bernard, Burwell, Carr, Cunningham, Davidson, Dever, Dickey, Dortch, Eaves, Finger, Hanes, Hooper, Jenkins, Jones, King, Lockhart, Mebane, Newland, Oats, Pridgen, Richardson, Scott of New Hanover, Shears, Staples, Pucker, York—26.

The Calendar.

SENATE CHAMBER, *February 5th*, 1881.

S. B. 224, bill to authorize the Northwestern North Carolina railroad to extend its road and to build branches thereof, on its third reading.

Mr. Glenn moves to amend:

77 Add to the first section the following: "Provided that nothing contained in this act shall operate or be construed so as to prevent or interfere with the construction of the North Carolina extension of the Virginia Midland railroad from Danville, Virginia, via Winston, Forsyth county, and Mocksville,

Davie county, to some point on the Atlantic, Tennessee and Ohio railroad, in Iredell county: but said company is hereby authorized to build said railroad under the organization and consolidation heretofore made by the stockholders and directors of the consolidated line, comprising the North Carolina extension."

Mr. Tucker moves to amend the amendment:

"Strike out all after the words 'Iredell county' in line 12." Lost.

Mr. Glenn's amendment was adopted.

Bill then passed its third reading, ayes 34, as follows:

Messrs. Battle, Blue, Burwell, Carr, Davidson, Dickey, Dortch, Faison, Finger, Foil, Glenn, Gudger, Hampton, Hanes, Harper, Harris, Jenkins, Jones, Manning, Mebane, Merritt, Newsom, Oats, Parish, Richardson, Scott of New Hanover, Scott of Rockingham, Spears, Spruill, Stowe, Tucker, Whitaker, Williamson of Davie and Wynne—34.

SENATE CHAMBER, *February* 11*th*, 1881.

From the committee on engrossed bills:

By Mr. Spears, S. B. 224, bill to authorize the Northwestern North Carolina railroad to extend its road and build branches thereto.

SENATE CHAMBER, *March* 2, 1881.

From the committee on enrolled bills:

S. B. 224, H. B. 634, an act to authorize the Northwestern North Carolina railroad Company to extend its road and build branches thereof.

HOUSE OF REPRESENTATIVES,
FRIDAY, *February* 11*th*, 1881.

A message from the senate is announced, transmitting S. B. 224, a bill to authorize the Northwestern North Carolina railroad to extend its road and build branches thereof.

S. B. 224 is referred to the committee on corporations.

HOUSE OF REPRESENTATIVES,
SATURDAY, *February* 12*th*, 1881.

78 *Reports of Committees.*

—— favorably on ——; and S. B. 224, H. B. 634, a bill to authorize the Northwestern North Carolina railroad to extend its road and build branches thereto.

HOUSE OF REPRESENTATIVES,
MONDAY, *February* 21*st*, 1881.

S. B. 224, H. B. 634, a bill to authorize the Northwestern North Carolina railroad to extend its road and build branches thereto.

HOUSE OF REPRESENTATIVES,
TUESDAY, *February* 22, 1881.

The morning hour having expired, on motion of Mr. Carter, the vote by which S. B. 224, H. B. 634, a bill to authorize the North-

western North Carolina railroad to extend its road and build branches thereof, is reconsidered; and the bill is placed on the calendar.

HOUSE OF REPRESENTATIVES,
THURSDAY, *February 24th*, 1881.

The calendar is taken up, and

S. B. 224, H. B. 634, a bill to authorize the Northwestern North Carolina railroad to extend its road and build branches, is put on its third reading.

Mr. Carter offers the following amendment:

Amend by adding to section 3 the following words:

"Provided, that nothing in this act contained shall be construed to authorize or empower the Western North Carolina Railroad Company to lend its credit, or otherwise in any manner contribute to the work or any part thereof contemplated in this act."

The amendment is adopted; and as amended, the bill passes its third reading, and is ordered to be sent to the senate with engrossed amendments.

HOUSE OF REPRESENTATIVES,
WEDNESDAY, *March 2d*, 1881.

Mr. Green, of Orange, from the committee on enrolled bills, reports the following bill to have been correctly enrolled: An act to authorize the Northwestern North Carolina Railroad Company to extend its road and to build branches thereof.

79 *Certificate of Secretary of State.*

NORTH CAROLINA,
Department of State.

RALEIGH, N. C., *January 15th*, 1897.

I, Cyrus Thompson, secretary of state, do hereby certify that the foregoing and annexed nine sheets contain a full and accurate transcript of the Journals of the Senate and House of Representatives of the State of North Carolina, for the Session of the General Assembly in the Year 1879, of so much of said Journal as relates to H. B. 103, S. B. 378, a bill to be entitled An act to amend the charter of the Northwestern North Carolina railroad, and for the construction of a Second division from the towns of Winston and Salem, Forsyth county, up the Yadkin valley, by Wilkesboro, to Patterson's factory, Caldwell county, the title, as published, of chapter 43, Public Laws of the Session of 1879; and of so much of the Journals of Senate and House of Representatives of the State of North Carolina, for the Session of the General Assembly in the Year 1881, as relates to S. B. 224, H. B. 634, a bill to be entitled An act to authorize the Northwestern North Carolina Railroad Company to extend its road and to build branches thereof, the title, as published, of chapter 162 of Public Laws of the Session of 1881.

Done in office at Raleigh, this the 15th day of January, A. D., 1897.

[SEAL.]

CYRUS THOMPSON,
Secretary of State.

Affidavits of G. W. Hinshaw.

N. C., }
Wilkes Co. }

In Superior Court.

G. W. Hinshaw, being duly sworn, deposes and says: That he is now, and was, in the spring of 1868, a resident of the town of Winston, Forsyth county, N. C. That in the spring of 1868 the county of Forsyth voted a subscription of one hundred thousand dollars to the Northwestern North Carolina Railroad Company. That thereafter and before the 6th day of November, 1888, the county of Forsyth became the owner of seventy-five thousand dollars of stock in said Northwestern North Carolina Railroad Company; and prior to said day in November, 1888, citizens of the county of Forsyth and of other counties in the State of North Carolina became owners of stock in the said Northwestern North Carolina Railroad Com-
80 pany, and that said county of Forsyth and said citizens were owners of said stock on said 6th day of November, 1888, and remained owners of said stock until the year 1895. That he is acquainted with the issuing of the bonds of Wilkes county in aid of the completion of the Northwestern North Carolina railroad; that none of the bonds are now held or owned by the Northwestern North Carolina Railroad Company, but the same were sold for value by the said railroad company before the year 1893. That the construction of the Northwestern North Carolina railroad from Greensboro, N. C., to Winston and Salem, N. C., was finished about the year 1873, and the line has since been and is now operated as a railroad line, freight and passenger trains having been run over the line of the same between Greensboro, N. C., and Winston and Salem, N. C., a distance of some twenty-nine miles. That in the year 1887, the work of constructing the road and of grading the road-bed between Winston, in Forsyth county, and Wilkesboro, in Wilkes county, was begun; and the work of grading said road-bed was continued until the work was completed to or near Wilkesboro, in the year 1890. That on the 6th day of November, 1888, the said Northwestern North Carolina railroad, between the towns of Winston and Wilkesboro, was an unfinished and incomplete railroad, the work of constructing the said railroad between the said towns having not been finished on said day in November, but the same being in an unfinished condition on said day, many miles of the line between said towns of Winston and Wilkesboro being ungraded and unfinished.

(Signed) G. W. HINSHAW.

Sworn and subscribed before me, this the 27th day of January, 1898.

N. S. WILSON,
Clerk Superior Court,
By SAM F. VANCE, *D. C.*

G. W. Hinshaw being duly sworn, says: That he was acquainted with the vote of the people of Wilkes county, referred to as Exhibit

"A" in the suit and attached to the complaint of plaintiff. That the vote was taken, based upon a contract with the Richmond and Danville Railroad Company instead of upon a contract with the Northwestern North Carolina Railroad Company, and the same was abandoned for that reason, and another vote taken in November, 1888.

(Signed) G. W. HINSHAW.

81 Sworn to and subscribed before me this 28th day of January, 1898.

(Signed) H. R. STARBUCK,
Judge Superior Court.

Certificate of Capital Stock.

Northwestern North Carolina Railroad Company, No. 159. Three hundred and thirty shares. Capital stock, two million dollars. Shares one hundred dollars each.

Be it known that commissioners of Wilkes county are entitled to three hundred and thirty shares in the Northwestern North Carolina Railroad Company, transferable by the said commissioners, either personally or by attorney, only at the office and in the books of said company.

Witness, A. B. Andrews, president of the Northwestern North Carolina — Company at Raleigh, N. C., under the seal of the corporation, this 9th day of May, A. D. 1890.

A. B. ANDREWS, *President.*
W. BROOK, *Secretary.*

Northwestern North Carolina Railroad Company, No. 160. Six hundred and seventy shares. Capital stock, twelve million dollars. Shares, one hundred dollars each.

Be it known that commissioners of Wilkes county are entitled to six hundred and seventy shares in the Northwestern North Carolina Railroad Company, transferable by the said ——, either personal- or by attorney, only at the office and in the book of said company.

Witness, A. B. Andrews, president of the said Northwestern North Carolina Railroad Company, at Raleigh, N. C., under the seal of the corporation, this 25th day of July, A. D. 1890.

A. B. ANDREWS, *President.*
W. BROOK, *Secretary.*

Certificate of Register.

NORTH CAROLINA, }
Wilkes County. }

I, E. M. Blackburn, register of deeds for Wilkes county, do hereby certify that the foregoing is a true copy, as occurs on railroad claim book, as appears in my office.

E. M. BLACKBURN,
Register of Deeds.

February 14, 1898.

82 *Affidavit of W. H. Watkins.*

W. H. Watkins, being duly sworn, deposes and says.—That in November, 1868, he was living near Clemmonsville, Davidson county, N. C., about eleven miles southwest of the towns of Winston and Salem. That in November, 1868, he left home and went to work as a foreman of hands, who were engaged in grading the road-bed of the Northwestern North Carolina railroad, about six miles east of the town of Salem, on the Levi Crews place. That there was under him about thirty-five hands. That he continued to work there in the construction of said road-bed during the winter of 1868 and in the spring of 1869, and remained as such foreman of hands grading said road at different points along the line until the entire line of road between Winston and Greensboro was completed, two or three years afterwards. That during the winter of 1868 and the spring of 1869 there were several companies of hands grading the said road-bed at different points along the line; and by the first of April, 1869, considerable grading had been done on said road-bed. That this work was being done by railroad company, under the general supervision of Edward Belo, now deceased, who was president of said railroad company.

W. H. WATKINS.

Sworn to and subscribed before me, this 28th day of January, 1898.

N. S. WILSON,
Clerk Superior Court,
By SAM F. VANCE, *D. C.*

Clerk's fee, twenty-five cents. Paid.

Affidavit of Rufus Harmon.

Rufus Harmon, being duly sworn, deposes and says:—That he was, in the year 1868, and is now, a resident of the town of Kernersville, in Forsyth county, North Carolina, a town on the line of the Northwestern North Carolina Railroad Company. That about the middle of October, 1868, Edward Belo, the president of the Northwestern North Carolina Railroad Company, sent to Kernersville for this affiant, and asked him to go on to Jonathan Crews' place, in Forsyth county, N. C., about three miles east of Salem, to build stockades for the hands employed by said Belo to grade the road-bed of said railroad. That this affiant went immediately, or within
83 a few days, to the said Crews' place, and on his arrival found three companies of hands with wheelbarrows, grading the road-bed of said railroad. That he remained with these companies of hands, made up of about twenty-five men each, until some time in April, 1869, when he was transferred to work on the line of said railroad in Guilford county. There companies of hands, at first with wheelbarrows and afterwards with cars and mules, worked in grading said railroad from the middle of October, 1868,

to April, 1869, continuously, with the possible exception of a few wet or cold days. That in addition to the carpenter work done by him, he was appointed commissary of subsistence, and gave out the rations to the hands, and before leaving, in April, 1869, he was giving out rations to about one hundred and fifty railroad hands. Edward Belo, now dead, was president of the railroad company during these months, and had general charge of the building of the road. In April, 1869, he was appointed by the chief superintendent of hands, J. J. Cahill, assistant superintendent of the construction force, and was sent to Guilford county and took charge of supplying the hands who were working in the county of Guilford on said road. That in April, 1869, several companies of hands began to work on the grading of the road in Guilford county, the work of grading continuing in the county of Forsyth. After remaining for some time at work in Guilford county, he was transferred to the work of grading at Bath Branch, in the county of Forsyth, just east of the town of Salem, N. C.

R. HARMON.

Sworn to and subscribed before me, this 21st day of January, 1898.

J. M. GUYER, *J. P.*

Fees, twenty-five cents. Paid.

Affidavit of C. C. Wright.

C. C. Wright, being duly sworn, says, that he is and has been a citizen and resident of Wilkes county for thirty-five years; that he was cognizant of the proceedings had in the railroad election mentioned, on June 16, 1887, and of the subsequent election held on November 6, 1888; and that never before has he heard that the reason the Northwestern North Carolina railroad was not completed, in accordance with the proposition first submitted, was because it was voted to the Richmond and Danville Railroad
84 Company, and not voted to the Northwestern North Carolina Railroad Company, as alleged in the affidavit of G. W. Hinshaw. But that the reason publicly given to the people of Wilkes county was that the time was too short for the railroad company to build the road, and, therefore, an extension of time was asked.

C. C. WRIGHT.

Subscribed and sworn to before me, January 29, 1898.

H. R. STARBUCK, *Judge.*

Admission of Counsel.

I admit that the act of 1868, chapter 171, purporting to provide for submitting the question of subscription, was read three times on different days in each house of the General Assembly, and was passed in accordance with the requirements of the constitution, article 2, section 14.

I do not admit, either, that said act or any part of it was in force, when either vote was taken in Wilkes county, as set forth in the exhibit to the plaintiff's complaint, or that, if in force, it authorized either of said elections.

A. C. AVERY.

Winston, February 15, 1898.

Injunction.

This cause, coming on to be heard before Starbuck, judge, at chambers, in Winston, upon a motion by plaintiffs to enjoin defendant until the final hearing from paying any portion of the principal or interest of the bonds issued by the county of Wilkes and described in the complaint. Upon consideration of the pleadings, treated as affidavits upon this hearing, the exhibits and all the affidavits and evidence introduced, it is now adjudged that the defendant, Clarence Call, sheriff of Wilkes county, be, and he is hereby enjoined and restrained until the final hearing or this cause from paying any portion of the moneys belonging to the county of Wilkes, and in his hands upon the principal or interest of the said bonds.

This February 18th, 1898.

(Signed) HENRY R. STARBUCK,
Judge Superior Court, Ninth Judicial District.

(To this judgment defendant excepts. Fifteen days allowed defendant to serve statement of case on appeal, and ten days thereafter allowed plaintiffs to serve exceptions or counter statements. Appeal bond fixed at one hundred dollars.)

(Signed) H. R. STARBUCK, *Judge, etc.*

85 *Order to Make New Parties Defendant.*

On motion of Richard N. Hackett, counsel for J. M. Turner and J. M. Wellborn, and by consent of the plaintiff, the said J. M. Turner and J. M. Wellborn, as the owners of one of the bonds of the county of Wilkes, the validity of which is controverted in the above-entitled action, are allowed to make themselves parties defendant to said action, and to file an answer.

(Signed) ALBERT L. COBLE,
Judge Presiding.

Answer of J. M. Wellborn and J. M. Turner.

The defendants, J. M. Turner and J. M. Wellboro, in answer to complaint, say:

I. That since this action was brought they have become the owners of one of the bonds, the validity of which is controverted in the above-entitled action and which were issued by the county of Wilkes, the number and amount being set forth in the complaint; and that the bond, of which they have so become the owners is numbered 34, of

the series of one hundred, issued at the time mentioned in the complaint.

II. That they adopt the answer of their codefendant, Clarence Call, treasurer of Wilkes county, as their own, and ask that it be taken and considered as the answer of these defendants, to all intents and purposes as if these defendants had denied the allegations of the complaint which are controverted by said Call in detail, and in the very language used in the answer of said Call.

III. That these defendants are advised, informed and believe that the rights of themselves and of the other owners of the said one hundred bonds, issued by the county of Wilkes, as owners of such bonds, have not been adjudicated in this action.

IV. Wherefore, these defendants pray:

1. That the order made by his honor, H. R. Starbuck, judge, at chambers, in Winston, N. C., containing the restraining order theretofore granted in this case, until the hearing of the cause, be vacated.

2. That said bonds be declared valid.

86 3. For such other and further relief as to the court may seem just.

4. For costs of action.

(Signed) RICHARD N. HACKETT,
Attorney for Defendants, Turner and Wellborn.

J. M. Turner and J. M. Wellborn, being duly sworn, depose and say, each for himself, that the facts stated in the foregoing answer as of his own knowledge are true, and those stated on information and belief, he believes to be true.

(Signed) J. M. TURNER.
(Signed) J. M. WELLBORN.

Sworn to and subscribed before me, this 8th day of March, 1898.

(Signed) A. W. VANNOY,
Clerk Superior Court,
By H. T. SMOAK, *D. C.*

Order of Removal.

This cause coming on to be heard before his honor, Coble, judge, upon motion of Richard N. Hackett, counsel for the defendants, J. M. Turner and J. M. Wellborn, who had been made parties defendant, and had answered at the present term of the court, to vacate and set aside the judgment of his honor, H. R. Starbuck, judge, rendered at chambers, at Winston, and containing the restraining order theretofore made to the hearing of the cause; and it appearing that a holder of the bonds, the validity of which is controverted, is related by affinity to the presiding judge.

It is by consent of counsel for the plaintiffs and counsel for defendants, J. M. Turner and J. M. Wellborn, ordered that *that* the motion be removed, to be heard before H. R. Starbuck, judge riding the tenth judicial district, at chambers, at Marion, North Carolina, on Monday, March 14, 1898, at 8 o'clock p. m.

The counsel for the defendants, Turner and Wellborn, being engaged at a term of the superior court of Wilkes county, which is expected to last beyond the 14th of March, at the request of said counsel, the counsel for the plaintiff agrees that all of the testimony offered at the hearing at Winston, before Judge Starbuck, shall be considered as offered at the hearing at Marion, on the 14th instant, subject to any objections as to competency made at the former hearing; and that his honor, Judge Starbuck, at the time of said hearing at Marion, or as soon thereafter as may be convenient to him, may make up a statement of case on appeal, without notice to the counsel, it being understood that the party against whom judgment may be rendered will desire to appeal to the supreme court of North Carolina.

87

It is further understood between counsel that the agreement this day, signed with a view to hearing before Judge Coble of the motion submitted, shall be considered as binding on the hearing before Starbuck, judge, at Marion, on March 14th.

(Signed) ALBERT L. COBLE,
Judge Presiding.

It is agreed, that in addition to the pleadings and exhibits and affidavits offered at the former hearing, the original charter of the Northwestern North Carolina Railroad Company, passed by the constitutional convention of 1868, and all amendments thereto, including the amendatory acts of 1879 and 1881, shall be read in evidence; and that the amendments passed in 1879 and 1881, purporting to give to another authority to submit the question of subscription to the capital stock of the company, were not passed by the house of representatives in accordance with the requirements of the constitution, and the certified exhibits from the journal of said sessions need not be offered or sent up as a part of the testimony.

It is agreed that the only legislation that is relied upon to give such authority is the original charter, passed as an ordinance of the constitutional convention of 1868, and the general statute enacted in 1868, as chapter —, being in the same language as contained in the code, sections 1996 to 2000, both inclusive.

It is further agreed, that the plaintiff still objects to the testimony offered for the defendant, Call, on the former hearing, to show when the Northwestern North Carolina Railroad Company was organized or incorporated.

(Signed) A. C. AVERY,
Attorney for Plaintiffs.

(Signed) RICHARD N. HACKET,
Attorney for Defendants, J. M. Turner and J. M. Wellborn.

88 *Judgment.*

This cause, coming on to be heard, upon motion of Richard N. Hackett, attorney for J. M. Turner and J. M. Wellborn, the holders of one of the bonds issued by the county of Wilkes, the validity of which is now in controversy in this action, and it appearing that

said motion was made before Coble, judge, at the spring term, 1898, of the superior court of Wilkes county; and that the said judge, being related by affinity to some of the holders of the bonds in controversy, said motion was by consent of counsel removed, to be heard at chambers, at Marion, on the 14th of March, 1898; and by consent of counsel for plaintiffs and counsel for the said Turner and Wellborn, the hearing of said motion was continued, first to be heard at Winston, on March 18th, 1898, and subsequently to be heard at Morganton, on March 22d, 1898; and being heard at last-named time and place, before the undersigned, upon the testimony heretofore offered, as set forth in a written agreement of counsel:

It is now, on motion of A. C. Avery, Finley and Green and Thomas Dula, counsel for the plaintiff, and upon hearing and considering the documentary evidence, mentioned in said agreement of counsel, considered and adjudged, that the motion to vacate, made on behalf of the defendants, Turner and Wellborn, as holders of one of the bonds in controversy. The order heretofore made containing restraining order until the hearing of the cause, be refused upon the ground that the bonds in controversy were issued by the board of commissioners of Wilkes county, without lawful authority so to do, and are invalid and void.

From the judgment of the court, refusing to vacate the said order containing the injunction to the hearing, the defendants, Turner and Wellborn appealed. Notice of appeal was waived, and an appeal bond in the sum of one hundred dollars adjudged sufficient.

H. R. STARBUCK,
Judge Riding Tenth Judicial District.

Statement of Case on Appeal.

It having been agreed that the undersigned should make up the statement of case on appeal without summoning counsel, it is ordered that the portions of the record, and the evidence mentioned in the agreement of counsel, entered into at spring term, 1898, in the superior court of Wilkes county, together with the sum-
89 mons, pleadings, exhibits, orders heretofore made, and the foregoing judgment rendered at chambers at Morganton, on the 22d of March, 1898, shall constitute the statement of the case on appeal.

H. R. STARBUCK,
Judge Riding Tenth Judicial District.

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90 *Petition of J. M. Turner and J. M. Welborn for an Injunction and Appointment of a Receiver.*

NORTH CAROLINA, }
Wilkes County. }

In the Superior Court.

THE COMMISSIONERS OF WILKES COUNTY and C. C. WRIGHT }
vs.
CLARENCE CALL, Treasurer, and J. M. TURNER and J. M. WELBURN. }

The petition of the undersigned respectfully showeth to the court:

1st. That in the above-entitled action the controversy involved the validity of $100,000, in bonds issued by the county of Wilkes in aid of the Northwestern North Carolina Railroad Company, and in lieu of shares of its stock, and that the defendant-, J. M. Turner and J. M. Welborn, are the owners of one of the bonds so issued, of the denomination of $1,000, and have taken the said action by writ of error from a decision adverse to the claim of right by them under the Constitution of the United States, to be heard by the Supreme Court of the United States where the said action is now pending for consideration.

2nd. That as petitioners, J. M. Welburn and J. M. Turner are informed and believe, Clarence Call, whose term of office as sheriff and *ex officio* treasurer of Wilkes county expired on the first Monday

in December, 1898, but who continues as tax collector to collect tax for the current year, has in his hands about the sum of $7,100.00 already collected as a special tax levied to meet the interest on said bonds, which he will pay over and may at any time pay over to his successor, John Johnson, who was elected sheriff on the 8th day of November, 1898, and on his induction into said office on the 1st Monday in December, 1898, became *ex officio* treasurer of said county, and that the said Call has been collecting and is collecting from time to time, a special tax levied for the same purpose for the current year, which he will, as required by law, pay or ought to pay over to the said Johnson, treasurer, as the same comes into his hands.

3rd. That, as petitioners are advised, it has been held by the supreme court of North Carolina in the case of Board of Education *vs.* Commissioners, 113 N. C., pp. ——, that where the treasurer of a county, as agent of and under the orders of the board of commissioners of such county applies a fund raised by special tax for
91 a particular purpose in payment of some county indebtedness other than that to which it was specially levied and collected, neither the said commissioners individually, nor the said treasurer individually, nor his bondsmen are liable to account for said funds so disbursed; and that such special tax cannot lawfully be replaced when so disbursed by a second levy for the same purpose, and that, therefore, if upon the receipt of any such special tax funds by the said Johnson, as treasurer, it shall be paid out, as it is liable to be so paid, the defendants, Turner and Welburn and other holders of said bonds, who have been invited by them to join in the defense of the above-entitled action will suffer irreparable loss.

Wherefore your petitioners pray that a receiver be appointed to take charge of said special tax fund already collected or which may hereafter be collected and hold the same subject to the order of the court.

2nd. That the plaintiffs and their agents be enjoined and restrained from disbursing any of said funds for any purpose other than for which it was levied until the qualification of such receiver and until the first adjudication in the action.

R. N. HACKETT,
Att'y for Petitioners.

J. M. Welburn, one of the defendants above named, and one of the petitioners, maketh oath that the facts set forth in the foregoing petition are true, except such as are stated on information and belief, and those facts he believes to be true.

J. M. WELBORN.

Sworn to and subscribed before me, this 31st day of January, A. D. 1899.

Witness my hand and seal of office.

L. BUMGARNER, *C. S. C.*

92 *Order Issued by Superior Court Appointing Receiver and Enjoining the Treasurer and Other Officers of Wilkes County.*

NORTH CAROLINA, *Wilkes County.*

Superior Court, at Chambers, at Winston, N. C.

THE COMMISSIONERS OF WILKES COUNTY and C. C. WRIGHT
vs.
CLARENCE CALL, Treasurer, and J. M. TURNER and J. M. WELBORN.

It appearing to the court by affidavit filed on behalf of the defendants, Turner and Welborn, that the above-entitled action has been taken up by writ of error from the supreme court of North Carolina to the Supreme Court of the United States, and that pending the consideration — the case in the Supreme Court there is a fund collected as special tax to meet the interest on the bonds in controversy still in the hands of Clarence Call, treasurer, amounting to about $7,100, which fund is to be paid over by him to John Johnson who became sheriff and *ex officio* treasurer on his induction into office on the 1st Monday in December, and that it will become the duty of the said Johnson, pending said appeal, to collect special tax also levied to meet the interest on said bonds, and it further appearing that if the board of commissioners of Wilkes county inducted into office on the 1st Monday in December, 1898, should cause any of the special tax fund, levied and collected to meet the interests on said bonds, to be applied to the payment and discharge of any other indebtedness of Wilkes county, and that the holders of said bonds could neither recover the sum so disbursed, if such disbursement should be held wrongfully by the Supreme Court of the United States, from the said treasurer or his bondsmen, nor from the said commissioners, personally, and that another special tax could not be levied upon the property of the people of Wilkes county to again raise funds to meet said interest in place of that so expended, and that the said commissioners are threatening to pay out such funds so collected and being collected, and thereby subject the defendant bondholders to irreparable loss and injury.

It is now, therefore, ordered, on motion of Richard N. Hackett, Esq., counsel for the defendants, Turner and Welborn, and by consent of A. C. Avery, attorney for the plaintiff; that J. G.

93 Hackett be appointed receiver to receive and take charge of any fund now in the hands of the said Call, or the said Johnson, or that may be paid over by said Call as tax collector to said Johnson as treasurer, and of such fund hereafter collected as special tax to pay the interest on said bonds, and that upon the filing by the said J. G. Hackett of a bond in the sum of $20,000, conditioned to faithfully account for all such sums of money as may come into his hands as receiver, and to disburse the same only under the orders of the court, the said J. G. Hackett is empowered and directed to receive and take charge of all funds collected by special tax to

meet the interest on said bonds, which has been already collected, or which may be collected hereafter.

It is further ordered that pending the consideration of the action in the Supreme Court of the United States, and until the further order of the court, upon the filing by said defendants of a bond in the sum of $100.00, conditioned as prescribed by law, where restraining orders or injunctions are granted, notice shall issue to the plaintiff that they and their agents, the treasurer of said county, and other agents, are enjoined and restrained, pending the consideration of the action in the said Supreme Court until the further order of this court.

O. H. ALLEN,
Judge Riding 9th Judicial Dist.

As attorney for the plaintiffs in the above-entitled action, I waive notice of the motion of defendants' counsel, R. N. Hackett, and agree that the foregoing order shall be made by the court, the judge now riding the 9th judicial district, whenever and wherever application may be made to him to grant said order.

A. C. AVERY,
Attorney for Plaintiffs.

NORTH CAROLINA, }
Wilkes County. }

In the Superior Court, February, 1899.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY and C. C. Wright
vs.
C. CALL, Treasurer of Wilkes County, and J. M. WELBORN and J. M. Turner.

This is to certify that J. G. Hackett, who has been duly appointed receiver in the above-entitled cause, has this day filed before me the bond required by Judge O. H. Allen, now riding the 9th
94 judicial district, and the same is hereby approved by me, and C. Call, ex-sheriff & treasurer of Wilkes county, and J. H. Johnson, present sheriff and treasurer of Wilkes county, are hereby ordered to turn over to J. G. Hackett, receiver, all the moneys in their hands mentioned in the order of his honor Judge Allen, a copy of which is hereto attached.

L. BUMGARNER,
Clerk Superior Court.

Bond of Receiver.

NORTH CAROLINA, }
Wilkes County. }

In the Superior Court.

THE COMMISSIONERS OF WILKES COUNTY and C. C. WRIGHT }
vs. }
CLARENCE CALL, Treasurer, and J. M. TURNER & J. M. WELBORN. }

Know all men by these presents that we, the undersigned, J. G. Hackett, principal, and C. N. Hunt, A. M. Church, J. R. Combs, J. E. McEwen, T. B. Finley, R. N. Hackett, sureties, are held and firmly bound unto the County of Wilkes, and State of North Carolina, in the sum of $20,000, to be levied on our lands and tenements, goods and chattels, to the faithful performance of which obligations we bind ourselves, our heirs and personal representatives.

The conditions of the above obligation are as follows: That whereas, the above-bounden J. G. Hackett, has been duly appointed receiver by his honor, O. H. Allen, judge riding 9th judicial district, to receive and take charge of any funds now in the hands of Clarence Call, ex-treasurer and tax collector of Wilkes county, or in the hands of J. H. Johnson, sheriff and *ex officio* treasurer of Wilkes county, which may have been collected by said Call as a special tax to pay the interest on the bonds in controversy in the above-entitled action and turned over by said Call as tax collector, to said Johnson as treasurer, and of such funds as may be hereafter collected by the tax collector of Wilkes county, as special tax to pay the interest on said bonds:

Now therefore if the said J. G. Hackett shall faithfully account for all such sums of money as may come into his hands as re-
95 ceiver, above named, and disburse the same only under the orders of the court, then this obligation shall be null and void, otherwise to remain in full force and effect.

Feb'y 23rd, 1899.

J. G. HACKETT. [SEAL.]
C. N. HUNT. [SEAL.]
A. M. CHURCH. [SEAL.]
J. R. x COMBS. [SEAL.]
J. E. McEWEN. [SEAL.]
T. B. FINLEY. [SEAL.]
R. N. HACKETT. [SEAL.]

C. N. Hunt, being duly sworn, says that he is worth the sum of $2,000 over and above his debts, liabilities and homestead and personal property exemptions.

A. M. Church, being duly sworn, says that he is worth the sum of $5,000 over and above his debts, liabilities and homestead and personal property exemptions.

A. M. CHURCH. [SEAL.]

J. R. Combs, being duly sworn, says that he is worth the sum of $5,000 over and above his debts, liabilities and homestead and personal property exemptions.

his
J. R. x COMBS. [SEAL.]
mark.

Attest: L. N. HICKERSON.

J. E. McEwen, being duly sworn, says that he is worth the sum of $3,000 over and above his debts, liabilities and homestead and personal property exemptions.

J. E. McEWEN. [SEAL.]

T. B. Finley, being duly sworn, says that he is worth the sum of $5,000 over and above his debts, liabilities and homestead and personal property exemptions.

T. B. FINLEY. [SEAL.]

R. N. Hackett, being duly sworn, says that he is worth the sum of $8,000 over and above his debts, liabilities and homestead and personal property exemptions.

R. N. HACKETT. [SEAL.]

Personally appeared before me, L. Bumgarner, clerk superior court of Wilkes county, the above-named J. E. McEwen, T. B. Finley, and R. N. Hackett, who being duly sworn say that they signed the above bond and that they are worth the amounts qualified
96 too by them in the above justification which was subscribed and sworn to before me this the 23rd day of February, 1899.

L. BUMGARNER, *C. S. C.*

Personally appeared before me, L. N. Hickerson, may- of the town of North Wilkesboro, J. R. Combs, C. N. Hunt and A. M. Church, who being duly sworn, say that they signed the above bond, and that they are worth the amount sworn too by them in the above justification which was subscribed and sworn to before me this February, 23rd 1899.

L. N. HICKERSON,
Mayor of North Wilkesboro.

Certificate of Superior Court Clerk.

NORTH CAROLINA, }
Wilkes County. }

I, L. Bumgarner, clerk of the superior court of Wilkes county, do hereby certify that the foregoing is a true copy of the original papers on files in this office in the case of The Board of Commissioners of Wilkes County *vs.* Clarence Call *et al.*, including petition and order appointing receiver and bond of receiver, with the exception of those portions marked out in the printed record, which are only referred to in the original papers, and that the copy of transcript of Journals,

Senate and House, is an exact copy as certified to this office by the secretary of state.

Witness my hand and seal, this April 11th, 1899.

[SEAL.] L. RUMGARNER,
Clerk Sup'r Court.

Endorsed: Filed in this office, April 12th, 1899. Sam'l L. Trogdon, clerk.

Answer of Clarence Call.

UNITED STATES OF AMERICA,
Western District of North Carolina.

W. N. COLER ET AL.
vs.
THE BOARD OF COMMISSIONERS OF WILKES County, Clarence Call, ex-Sheriff, *et al.*
Answer of C. Call.

Clarence Call, *answer* the complaint in the above-entitled cause, says:

97 1. That paragraphs 1, 2, 3, 4, 6, 7, 9, 10, 11, 12, 13, 14, 15, 19, 20, 22, 23, 24 & 27 are true.

2. That paragraphs 5, 8, 21 & 25 — supposed to be true.

3. That paragraph 16 is not denied, except the charge of collusion between this affiant and the plaintiff in the injunction proceedings in the State courts, which is denied.

4. That this defendant can neither admit nor deny paragraph 16, but says, in reply thereto, that after the injunction proceedings had been heard by Judge Starbuck, that this defendant concluded he would not perfect his appeal—said decision being in favor of the county, and believing that said judgment would stand till reversed, thought it best for the county that he should not appeal, and shortly thereafter, to his surprise, the counsel for the county of Wilkes, in said suit, wanted him to appeal to the supreme court of North Carolina, and when he declined was offered to be indemnified against any cost he might incur by reason of said appeal, including his attorneys' fee for arguing said case in the supreme court, and it was after this defendant's positive*ly* refusal to carry up said appeal that Welborn and Turner, by some means unknown to this defendant, became parties to said proceedings, and an appeal by them was perfected, and the case carried to the supreme court of North Carolina, and while Judge Starbuck's decision was affirmed, the cost of said appeal was paid by Wilkes county. That this defendant was treasurer of Wilkes county for four years, and that he never heard of Welborn or Turner owning a county bond till about the time they became parties to said suit.

5. That this defendant can neither admit nor deny paragraph 17, but says, in reply thereto, that while the county of Wilkes, in addition to attorneys' fees, was to pay expenses of said attorneys in conducting said suit, and while said expense accounts had from time to time been filed, and allowed, and paid, at a special meeting

of the board of county commissioners, in November, 1898, an order was passed allowing Judge Avery $600.00 for expenses without filing any expense account, and when no expenses were then unpaid, said sum of $600 to be paid out of any funds in the treasurer's hands, except school funds and State taxes, and a claim was issued for said $600.00, and a demand was made on this defendant while treasurer of Wilkes county to pay said claim out of the bond fund then in his hands. That on the 1st Monday in December, 1898, a new board of commissioners took charge, and at their meeting in January, 1899, rescinded the $600 allowance to Judge Avery for expenses, and directed that notice be given to counsel to file itemized statement of said expenses, and at the February, 1890, meeting, the counsel for the county advised the county commissioners that, if forced to file an itemized statement of where the $600 was to be used, that it would show their *bond* to the bondholders, and could not at that juncture afford to do so, as this defendant is informed and believes, and whether for this cause or another, the order of $600 was reinstated and now stands on the claim book of Wilkes county, and affiant believes that, but for the temporary order issued in this cause, that said $600 would have been paid out of the bond funds. And defendant further says that, in conversation with P. A. Lomax, former chairman of the board of commissioners, affiant asked said chairman why they allowed the $600 without any account being filed therefor, and said chairman replied, "For reasons best known to ourselves."

98

6. That in answer to paragraph 26, this defendant says there is now no controversy between the parties therein referred to—this defendant has paid to his successor in office, J. H. Johnson, all of the bond fund, except the levy made in 1898, and this sum he is ready to pay when due, and while this defendant does not believe that his codefendants, of their own motion, would make way with the bond fund, still, unless restrained by this court, orders will be continually drawn upon J. H. Johnson, treasurer, or J. G. Hackett, State court receiver, and a good portion of this money will go in this way.

And this defendant, having fully answered, asks that such order be signed by your honor as will clearly define the duties of the defendants during the pendency of this litigation—such an order as will be a protection to the county officials, as well as to the bondholders.

Personally appeared Clarence Call, and makes oath that the facts set forth in the foregoing answer are true, except as to the matters stated on information and belief, and as to those matters he believes — to be true.

(Signed) C. CALL.

Subscribed and sworn to before me, April 11, 1899.

L. BUMGARNER,
Clerk Sup'r Court.

Endorsed: Filed in this office, April 12, 1899. Sam'l L. Trogdon, clerk.

99 *Answer of John H. Johnson.*

UNITED STATES OF AMERICA:

In the United States Circuit Court, Western District of North Carolina.

W. N. COLER, W. N. COLER, JR., BIRD S. COLER, JAMES W. Campbell, and Francis B. Coler, under the Name and Style of W. N. Coler and Company, Complainants,

vs.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY and CLARence Call, ex-Sheriff and *ex Officio and* ex-Treasurer, and John H. Johnson, Sheriff and Treasurer *ex Officio* of Wilkes Co., Respondents.

The defendant, John H. Johnson, now and at all times hereafter saving to himself all and all manner of benefit or advantage of exceptions or otherwise that can or may be had or taken to the many errors, uncertainties and the imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised is material or necessary for him to make answer to, answering says:

1.

That he has read the answer of his codefendant, The Board of Commissioners of Wilkes County, and that he is informed and believes the matters of defense and the facts stated in said answer are true, and this defendant adopts the said answer and prays that it may be treated as his own answer to each and every section of the bill of complaint.

2.

Further answering the said bill of complaint, this defendant says that he is informed and believes that the action entitled "The Board of Commissioners of Wilkes County and C. C. Wright *versus* Clarence Call and others," referred to in the bill of complaint as having been adjudicated in the supreme court of North Carolina, had been carried by writ of error to the Supreme Court of the United States, and that the said Supreme Court of the United States has held that the Federal courts are bound to follow the adjudications of the State courts in that case, and affiant is advised by
100 counsel, that if such had been the adjudication of said court the holders of one of the bonds in controversy having been parties to said action, questions involved in this cause and set forth in the bill of complaint as the plaintiffs' ground of complaint have been adjudicated, and the plaintiffs are estopped from denying that the bonds in controversy are invalid for want of authority in the said board of commissioners to issue them, and this defendant is further advised, informed and believes that after said action had been carried up by writ of error to said Supreme Court, and while

it was there pending, the superior court of Wilkes county, in the exercise of its rightful jurisdiction, and to the end that the fund mentioned in the bill of complaint as collected under a special levy to meet the interest on the bonds in controversy and as being in the hands either of the defendant Call or this defendant, be protected and preserved, to wit: the orders of the court to be made in pursuance of the adjudication of the Supreme Court of the United States, made, upon petition in said action, an order, which was signed by O. H. Allen, judge riding the judicial district in which Wilkes county is situated, and having rightful jurisdiction in the premises, by which order it was adjudged that Gordon Hackett, be appointed receiver to take charge of and hold under the direction of said superior court all funds that might be collected by the tax collector of Wilkes county as a special tax to meet the interest on said bonds.

3.

And this defendant is advised, informed and believes, that, upon the making of said order, a copy of which certified under the seal of the clerk of the superior court is hereto attached, marked Exhibit A, the said superior court acquired jurisdiction to appoint a receiver and to control the said fund as collected and to hold the same subject to the action of said higher court, and this defendant therefore, being so advised, specially avers and pleads that this court has no jurisdiction because the said court, which is one of concurrent jurisdiction, had already assumed control of the said fund before the bill of complaint was filed.

And this defendant is further advised, informed and believes the questions and issues involved in this controversy and set up as a cause of action or the grounds of the suit in the bill of complaint, has already been adjudicated finally by the Supreme Court of the United States upon the hearing on said writ of error, in which action the holders of one of said bonds had made themselves parties and had invited all other holders of said bonds to join them as par-
101 ties defendants, and that said adjudication has been made since the said bill of complaint was filed, and this defendant specially avers and pleads that the plaintiffs are estopped by the said adjudication and will be finally estopped upon the rendition of a final judgment in the superior court of Wilkes county upon the coming down of the certificate therein, and this defendant prays the court to continue this cause until the coming down of said certificate, to the end that he may be enabled to properly plead as a defense that the questions and issues involved in this controversy have been so finally adjudicated and that the plaintiffs are estopped.

And this defendant denies all and all manner of unlawful combination and confederacy, wherewith he is by the said bill charged, without this, that there is any other matter, cause, or thing in the said plaintiffs' said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confess-, traversed and avoided or denied, is true to the knowledge or belief of this defendant;

all which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

JOHN H. JOHNSON.
A. C. AVERY,
T. J. DULA,
FINLEY & GREEN,
Attorneys.

John H. Johnson, being duly sworn, maketh oath, that he is the defendant above named, and that so much of the foregoing answer as concerns his own acts and deeds, is true, to the best of his own knowledge; and so much thereof as concerns the acts or deeds of any other person or persons, he believes to be true.

JOHN H. JOHNSON.

Sworn to and subscribed before me this 3rd day of April, 1899, as witness my hand and seal of office.

L. BUMGARNER, *C. S. C.*,
By H. T. SMOOK, *D. C.*

Endorsed: Filed in this office April 13th, 1899. Sam'l L. Trogdon, clerk.

102 *Replication to Answer of the Board of Commissioners.*

United States Circuit Court, Western District of North Carolina.

GREENSBORO, N. C., *April 12th*, 1899.

W. N. COLER, W. N. COLER, JR., BIRD S. COLER, JAMES W. Campbell, and Francis W. Coler, Bankers, under the Name and Style of W. N. Coler & Company, Compl'ts,
vs.
THE BOARD OF COMMISSIONERS OF WILKES COUNTY and Clarence Call, ex-Sheriff and *ex Officio* ex-Treasurer, and John H. Johnson, Sheriff and *ex Officio* Treasurer of Wilkes County, Respondents.
} In Equity.

Replication.

The complainants come and file this their replication to the answer of the respondent, The Board of Commissioners of Wilkes County, and say:

1. That they reiterate and affirm their allegations contained in their original bill.

2. That the allegations contained in the answer of the respondent, denying the allegations, or any of the same, and matters and things set out in complainants' bill are not true.

3. That the allegations of matters and things, as set out in the

answer of said respondent, not in denial of the allegations in the bill, but set up as a defense, are not true, and are denied.

4. That denying the allegations of respondent, and reiterating the allegations contained in the bill, complainants are ready to prove the truth of the matters and things, entitling them to the relief demanded in the bill.

CHAS. PRICE,
Solicitor for Compl'ts.

Chas. Price, being sworn according to law, says that he is the attorney and solicitor of the complainants, and that this replication is true.

CHAS. PRICE.

103 Sworn to and subscribed before me this 12th day of April, 1899.

(Signed) JOHN L. RANDLEMAN,
[SEAL.] *Notary Public.*

Endorsed: Filed in this office April 20th, 1899. Sam'l L. Trogdon, clerk.

Replication to Answer of Clarence Call.

United States Circuit Court, Western District of North Carolina.

GREENSBORO, N. C., *April 12th*, 1899.

W. N. COLER, W. N. COLER, JR., BIRD S. COLER, JAMES W. Campbell, and Francis W. Coler, Bankers, under the Name and Style of W. N. Coler & Co., Complainants,
vs.
THE BOARD OF COMMISSIONERS OF WILKES CO. and Clarence Call, ex-Sheriff and *ex Officio* ex-Treasurer, and John H. Johnson, Sheriff and *ex Officio* Treasurer, of Wilkes County, Respondents. } In Equity.

Replication.

The complainants come and file this their replication to the answer of the respondent, Clarence Call, and says:

1. That they reiterate and affirm their allegations contained in their original bill.

2. That the allegations contained in the answer of the respondent, denying the allegations or any of the same, and matters and things set out in complainants' bill are not true.

3. That the allegations of matters and things, as set out in the answer of said respondent, not in denial of the allegations in the bill, but set up as a defence, are not true, and are denied.

4. That in denying the allegations of respondent and reit-
104 erating the allegations contained in the bill, complainants are

ready to prove the truth of the matters and things entitling them to the relief demanded in the bill.

CHAS. PRICE,
Solicitor for Compl'ts.

Charles Price, being sworn according to law, says that he is the attorney and solicitor of the complainants, and that this replication is true.

CHAS. PRICE.

Sworn to and subscribed before me this 12th day of April, 1899.
[SEAL.] J. L. RANDLEMAN,
Notary Public.

Endorsed: Filed in this office, April 20th, 1899. Sam'l L. Trogdon, clerk.

Replication to Answer of John H. Johnson.

United States Circuit Court, Western District of North Carolina.

GREENSBORO, N. C., *April* 12, 1899.

W. N. COLER, W. N. COLER, JR., BIRD S. COLER, James W. Campbell, and Francis W. Coler, Bankers, under the Name and Style of W. N. Coler & Co., Comp'lts,
vs.
THE BOARD OF COMMISSIONERS OF WILKES CO. and Clarence Call, ex-Sheriff and *ex Officio* ex-Treasurer, and John H. Johnson, Sheriff and *ex Officio* Treasurer of Wilkes County, Respondents.
} In Equity.

Replication.

The complainants come and file this their replication to the answer of the respondent, John H. Johnson, and says:

1. That they reiterate and affirm their allegations contained in their original bill.

2. That the allegations contained in the answer of the re-
105 spondent denying the allegations or any of the same, and matters and things set out in complainants' bill are not true.

3. That the allegations of matters and things, as set out in the answer of said respondent, not in denial of the allegations in the bill, but set up as a defence, are not true, and are denied.

4. That in denying the allegations of respondent, and reiterating the allegations contained in the bill, complainants are ready to prove the truth of the matters and things entitling them to the relief demanded in the bill.

CHAS. PRICE,
Solicitor for Complainants.

Charles Price, being sworn according to law, says that he is the attorney and solicitor of the complainants, and that this replication is true.

CHAS. PRICE.

Sworn to and subscribed before me this 12th day of April, 1899.
[SEAL.] J. L. RANDLEMAN,
Notary Public.

Endorsed: Filed in this office April 20th, 1899. Sam'l L. Trogdon, clerk.

Affidavit of L. C. Jennings.

UNITED STATES OF AMERICA:

In the Circuit Court of the United States, Western District North Carolina.

COLER & COMPANY
vs.
THE BOARD OF COMMISSIONERS OF WILKES COUNTY ET AL.

L. C. Jennings maketh oath:

1st. That he is one of the commissioners of Wilkes county, and was conducted into office on the first Monday in December, A. D. 1898.

2nd. That at the regular January meeting of the board, the first meeting held after the meeting at which the new board was
106 organized, and, in the absence of the chairman of the board, John P. Peden, the defendant Call appeared before the board, and advised them that it was their duty to pay off the bill of costs against J. M. Turner and J. M. Welborn, sent down from the Supreme Court, which he said that he had paid, relying on having it allowed in his settlement, as retiring sheriff of the county, and being inexperienced, the board confided in Call's representation as to their duty, and credited him with the amount of said bills.

3rd. That affiant has reason to believe, and does believe now, that said Call abused the confidence of the officers, just inducted into office and who were his personal and political friends and associates, in furtherance of a scheme to hatch up a charge of collusion, as he has done in his answer.

4th. That at said meeting in January, B. S. Call, the brother and former partner in business of the defendant, Clarence Call, and his uncle, E. O. Masten, approached affiant as an individual, and said B. S. Call appeared before the board at said January meeting, and both argued that the order auditing a claim of A. C. Avery, as attorney, of $600 should be rescinded and notice issued to said Avery, and through such influences the board were induced to rescind said order, which was reinstated and the rescinding order stricken out at a subsequent meeting.

5th. That affiant now has reason to believe and does believe that said advice was given at the instance of persons interested adversely to the board, in the pending and proposed litigation, as to the validity of the bonds and with the view of preventing the county from testing their validity.

6th. That, as affiant is informed and believes, on the day that counsel came to Wilkesboro, in December, 1897, to meet the former board of commissioners, the defendant, Clarence Call, sent a telegraphic message to Henry W. Miller, chief clerk of A. B. Andrews, vice-president of the Southern Railway Company, who has been in the habit of collecting the interest on the bonds in controversy, warning the said Miller to collect the special-tax fund then in his hands as *ex officio* treasurer of the courts, and that said Miller accordingly sent or came for said fund before any restraining order was issued.

7th. That, as affiant is informed and believes, the defendant, Call, stated boastingly that he had been represented, without
107 charge of any fee, by Mr. Lindsey Patterson, who was counsel for the holder or holders of some of the bonds in controversy, in the courts of the State and acted on his advice in the conduct of the case pending in the superior court and refusing to appeal from the decision of Judge Starbuck.

8th. That affiant denies the charge that there has ever been any purpose or agreement on the part of the present board of commissioners and Gordon Hackett to induce the judges of the superior court to countenance the wasting or misapplication of the fund collected as a special tax, but affiant is informed and believes that the defendant, Call, proposes to apply to the circuit court of the United — for the place of receiver, should the court determine to appoint one in this cause.

L. C. JENNINGS.

Sworn to and subscribed before the undersigned, this the 13th day of April, A. D. 1899.

SAM'L L. TROGDON, *Clerk.*

Endorsed: Filed in this office, April 13th, 1899. Sam'l L. Trogdon, clerk.

Affidavit of P. A. Lomax.

UNITED STATES OF AMERICA,
Western District of North Carolina.

In the United States Circuit Court.

W. N. COLER, W. N. COLER, JR., BIRD S. COLER, JAMES W. CAMPbell, and Francis B. Coler, under the Name and Style of W. N. Coler and Company, Complainants,

vs.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY and CLARENCE Call, ex-Sheriff and *ex Officio and* ex-Treasurer, and John H. Johnson, Sheriff and Treasurer *ex Officio* of Wilkes County, Respondents.

P. A. Lomax maketh oath before the undersigned, after being duly sworn,

1st. That he served as a member of the board of commis-
108 sioners of Wilkes county for the term expiring on the 1st Monday in December, A. D. 1898, when the present board of commissioners for said county were inducted into office.

2nd. That the said board of commissioners, of which affiant was a member as aforesaid, did not agree to pay the expenses incurred by J. M. Turner and J. M. Welburn as defendants in the action, originally instituted against Clarence Call, and wherein said Turner and Welburn were made defendants, as affiant is informed has been alleged by the plaintiffs in the above-entitled cause, and that said board did not pay to the said Turner and Welburn any sum of money to defray such expenses.

P. A. LOMAX.

Sworn to and subscribed before the undersigned, this the 31st day of March, 1899, as witness his hand and seal of office.

T. M. BYRD,
J. P., Wilkes County.

STATE OF NORTH CAROLINA,
Wilkes County.

Superior Court.

I, Linville Bumgarner, clerk of the superior court in and for the county and State aforesaid, do hereby certify that T. M. Byrd, whose genuine signature appears to the abo e certificate, is, and was at the time of signing the same, an acting justice of the peace in and for Wilkes county, and duly qualified according to law.

Witness my hand and the seal of said court, this 3rd day of April, 1899.

LINVILLE BUMGARNER,
Clerk Superior Court.

Endorsed: Filed in this office, April 13th, 1899. Sam'l L. Trogdon, clerk.

109 *Affidavit of R. P. Yates.*

UNITED STATES OF AMERICA,
Western District of North Carolina.

In the United States Circuit Court.

W. N. COLER, W. N. COLER, JR., BIRD S. COLER, JAMES W. CAMPbell, and Francis B. Coler, under the Name and Style of W. N. Coler and Company, Complainants,
versus
THE BOARD OF COMMISSIONERS OF WILKES COUNTY and CLARENCE Call, ex-Sheriff and *ex Officio and* ex-Treasurer, and John H. Johnson, Sheriff and Treasurer *ex Officio* of Wilkes County, Respondents.

R. P. Yates maketh oath before the undersigned, after being duly sworn:

1st. That he served as a member of the board of commissioners of Wilkes county for the term expiring on the 1st Monday in December, A. D. 1898, when the present board of commissioners for said county were inducted into office.

2nd. That the said board of commissioners, of which affiant was a member as aforesaid, did not agree to pay the expenses incurred by J. M. Turner and J. M. Welburn as defendants in the action, originally instituted against Clarence Call, and wherein said Turner and Welburn were made defendants, as affiant is informed has been alleged by the plaintiffs in the above-entitled cause, and that said board did not pay to the said Turner and Welburn any sum of money to defray such expense.

R. P. YATES.

Sworn to and subscribed before the undersigned, this the 27th day of March, 1899, as witness his hand and seal of office.

SIDNEY SWANSON, *J. P.*

STATE OF NORTH CAROLINA,
Wilkes County.

Superior Court.

110 I, Linville Bumgarner, clerk of the superior court, in and for the county and State aforesaid, do hereby certify that Sidney Swanson, whose genuine signature appears above is, and was at the time of signing the same, an acting justice of the peace in and for Wilkes county, and duly qualified according to law.

Witness my hand and the seal of said court, this 28th day of March, 1899.

LINVILLE BUMGARNER, *C. S. C.*

Endorsed: Filed in this office April 13, 1899. Sam'l L. Trogdon, clerk.

Affidavit of C. C. Wright.

UNITED STATES OF AMERICA, }
Western District of North Carolina. }

In the United States Circuit Court.

W. N. COLER, W. N. COLER, JR., BIRD S. COLER, JAMES W. Campbell, and Francis B. Coler, under the Name & Style of W. N. Coler and Company, Complainants,

versus

THE BOARD OF COMMISSIONERS OF WILKES COUNTY and CLARENCE Call, ex-Sheriff and *ex Officio and* ex-Treasurer, and John H. Johnson, Sheriff and Treasurer *ex Officio* of Wilkes County, Respondents.

C. C. Wright maketh oath before the undersigned, after being duly sworn:

1st. *The* he served as a member of the board of commissioners of Wilkes county for the term expiring on the 1st Monday in December, A. D. 1898, when the present board of commissioners for said county were inducted into office.

2nd. That the said board of commissioners, of which affiant was a member as aforesaid, did not agree, to his knowledge, to pay the expenses incurred by J. M. Turner and J. M. Welborn as defendants in the action, originally instituted against Clarence Call, and wherein said Turner and Welburn were made defendants, as affiant is informed has been alleged by the plaintiffs in the above-entitled cause, and that said board did not pay to the said Turner and Welburn any sum of money to defray such expense.

C. C. WRIGHT.

111 Sworn to and subscribed before the undersigned, this the 5th day of April, 1899, as witness his hand.

RUFUS TRANSON, *J. P.*

NORTH CAROLINA, }
Wilkes County. }

I hereby certify that Rufus Transon, whose genuine signature appears to the above jurat is, and was at the time of signing the same, a justice of the peace of Wilkes county, and that his official acts are entitled to credit.

Witness my hand and the seal of said court this April 6th 1899.

L. BUMGARNER, *C. S. C.*,
By H. T. SMOOK, *D. C.*

Endorsed: Filed in this office April 13th, 1899. Sam'l L. Trogdon, clerk.

Affidavit of W. C. Myers.

UNITED STATES OF AMERICA,
Western District of North Carolina.

In the United States Circuit Court.

W. N. COLER, W. N. COLER, JR., BIRD S. COLER, JAMES W. Campbell, and Francis B. Coler, under the Name and Style of W. N. Coler and Company, Complainants,
versus
THE BOARD OF COMMISSIONERS OF WILKES COUNTY and CLARENCE Call, ex-Sheriff and *ex Officio and* ex-Treasurer, and John H. Johnson, Sheriff and Treasurer *ex Officio* of Wilkes County, Respondents.

W. C. Myers maketh oath before the undersigned, after being duly sworn:

1st. That he served as a member of the board of commissioners of Wilkes county for the term expiring on the 1st Monday in December, A. D., 1898, when the present board of commissioners for said county were inducted into office.

2nd. That the said board of commissioners, of which
112 affiant was a member as aforesaid, did not agree to pay the expenses incurred by J. M. Turner and J. M. Welburn as defendants in the action, originally instituted against Clarence Call, and wherein said Turner and Welburn were made defendants, as affiant is informed has been alleged by the plaintiffs in the above-entitled cause, and that said board did not pay to the said Turner and Welburn any sum of money to defray such expense.

W. C. MYERS.

Sworn to and subscribed before the undersigned, this the 1st day of April, 1899, as witness his hand and seal of office.

N. E. MOORE,
J. P., Wilkes County.

STATE OF NORTH CAROLINA,
Wilkes County.

Superior Court.

I, Linville Bumgarner, clerk of the superior court in and for the county and State aforesaid, do hereby certify that N. E. Moore, whose genuine signature appears to the above certificate, is, and was at the time of signing the same, an acting justice of the peace in and for the county of Wilkes, and duly qualified according to law.

Witness my hand and the seal of said court, this 3rd day of April, 1899.

LINVILLE BUMGARNER, *C. S. C.*

Endorsed: Filed in this office, April 13, 1899. Sam'l L. Trogdon, clerk.

Affidavit of J. M. Turner.

UNITED STATES OF AMERICA,
Western District of North Carolina.

W. N. COLER AND COMPANY
vs.
THE BOARD OF COMMISSIONERS OF WILKES COUNTY & Others.

J. M. Turner maketh oath before the undersigned, after being duly sworn:

113 1st. That he is informed, that in the above-entitled cause it has been alleged that affiant and J. M. Welburn are not the owners of a certain bond, by virtue of which they became parties defendant in an action brought in the superior court of Wilkes county.

2nd. That the said allegations is not true and that affiant and said Welburn are the joint owners of the said bond.

J. M. TURNER.

Sworn to and subscribed before me this the 7th day of March, A. D. 1899, as witness my seal of office.

[SEAL.]

L. BUMGARNER, *C. S. C.*,
By C. H. COLVARD, *D. C.*

Endorsed: Filed in this office, April 13, 1899. Sam'l L. Trogdon, clerk.

Affidavit of Charles Price.

Chas. Price, being duly sworn according to law, says that he was the master who sold under the decree of foreclosure and sale, passed by the circuit court of the United States, the North Western North Carolina railroad, and conducted the sale of the same in person, the Hon. Theodore F. Klutz, of Salisbury, N. C., being the crier, and before the sale the Hon. Robert M. Douglass protested against the same in writing, and in his proper person as he did, also, against the confirmation of the sale before Judge Simonton, at Salisbury, N. C.

CHAS. PRICE.

Sworn to and subscribed before me this 12th day of April, 1899.

SAM'L L. TROGDON, *Clerk.*

114 *Agreement of Counsel Accepting Service of Citation and Extending Time for Preparing Record.*

Circuit Court of the United States, Western District of North Carolina, Fourth Circuit. In Equity.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY, Appellants,
vs.
W. N. COLER AND COMPANY, Appellees.

It is agreed by counsel in the above-entitled cause that counsel for the complainants will at once accept service of a citation on appeal, and that the time for preparing the record on appeal be extended to July 1st, A. D., 1899.

CHAS. PRICE,
Sol. — Complainants.
A. C. AVERY,
Sol. for Defendants.

Endorsed: Filed in this office April 21, 1899. Sam'l L. Trogdon, Clerk.

Agreement of Counsel for Appellees to Allow Time to Perfect Appeal.

Circuit Court of the United States, Western District of North Carolina, Fourth District. In Equity.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY and J. H. Johnson, Sheriff and *ex Officio* Treasurer of Wilkes County, Appellants,
vs.
W. N. COLER AND COMPANY, Appellees.

Agreement of counsel for appellees to allow time to perfect appeal.

It is hereby agreed that the solicitors for the appellants in the above-entitled cause shall be allowed further time until the
115 1st day of July, A. D. 1899, to perfect their case on appeal to the United States circuit court of appeals *to* the fourth *district* at the city of Richmond.

CHAS. PRICE,
Solicitor for Appellees.
A. C. AVERY,
Solicitor for Appellants.

This the 25th of April, A. D. 1899.

Endorsed: Filed in this office May 8th 1899. Sam. L. Trogdon, clerk.

Agreement of Counsel as to Record and Opinion.

Circuit Court of the United States, Western District of North Carolina, Fourth Circuit. In Equity.

THE BOARD OF COMMISSIONERS OF WILKES County and J. H. Johnson, Sheriff and *ex Officio* Treasurer of Wilkes County, Appellants,
vs.
W. N. COLER AND COMPANY, Appellees.
} Agreement of Counsel.

Counsel for the complainants, Coler and Company, having offered in evidence on the hearing the printed transcript of record lately filed in the Supreme Court of the United States, in the case of J. M. Turner and J. M. Welburn, plaintiffs in error, *versus* The Board of Commissioners of Wilkes County, to show a discrepancy in the language of the opinion of the court sent up as a part of said record, and the opinion of the court as published in the North Carolina Reports, — is now agreed by counsel that the following language appears in said opinion as printed in said transcript of record, to wit:

"Enough appears to indicate, what is common knowledge, that the railroad does not touch the county of Wilkes, and that the stock for which these bonds were issued has been swept away in the maealsstrom of corporate reorganization," and that in lieu of said language the following sentence is substituted in the opinion of the court in said action, as published on page 326 of volume 123 of the N. C. Report-, to wit:

"Enough appears to indicate, what is common knowledge,
116 that the stock for which these bonds were issued has been swept away in the maealstrom of corporate reorganization."

It is further agreed by counsel to constitute a part of the record on appeal in the above-entitled cause,

1st. That an action was brought by J. M. Turner, E. Wallace and other, tax-payers of Wilkes county, *versus* The Richmond and Danville Railroad Company, The Northwestern North Carolina Railroad Company and The Board of Commissioners of Wilkes County, returnable to the fall term of the superior court of Wilkes county, A. D. 1893, for the purpose of compelling defendants by mandamus to build and construct the Northwestern North Carolina railroad across the Yadkin river from North Wilkesboro to Wilkesboro, a distance of about one mile, and that the plaintiffs in said action submitted to judgment of nonsuit which was rendered at the fall term 1895, of said superior court.

2nd. It is further admitted and agreed between counsel that it may appear as a part of the record on appeal that an action was brought by Jessie M. Douglas and others as plaintiffs against The Northwestern North Carolina Railroad Company and others as defendants, returnable to the superior court of Guilford county at the June term 1888, for the purpose of preventing and restraining the

Northwestern North Carolina Railroad Company from issuing mortgage bonds constituting a lien upon the completed road of said company to *and* in the extension of its line.

3rd. That when the franchise and property of the Northwestern North Carolina Railroad Company was offered for sale under a decree of foreclosure made by the circuit court of the United States by the special master named in said decree at Winston, in the year 1894, R. M. Douglas, the justice who delivered the opinion of the court contained in said transcript was present and for and on behalf of his wife, as a stockholder, forbade said sale in writing, and appeared before the circuit judge and opposed the granting of the decree confirming said sale.

It is agreed that the certified extracts from the Journals of the Legislative House of North Carolina, contained in the record of the proceedings in the superior court of Wilkes county and in the supreme court of North Carolina, filed as an exhibit to the supplemental answer, present a correct history of legislative action in reference to the amendments to the charter of the Northwestern North Carolina Railroad Company, ratified, respectively, at
117 the sessions of said legislature in 1879 and 1881, and that the copies of said legislative proceedings offered at the hearing need not be sent up, except the extracts from the Journals of the House of Representatives at the special session of 1868, in reference to the private act ratified August 11th, 1868, which, with the other said amendments is filed as an exhibit to the complaint.

It is further agreed that the opinion of Judge Purnell as published in the Federal Reporter (volume 90) filed in Union Bank *vs.* Town of Oxford and which is to be adopted as the opinion in this case, need not be sent up as part of the record.

It is further agreed, that the affidavits contained in the exhibit filed with the supplemental answer be considered as offered at the hearing.

CHAS. PRICE,
Sol. — Complain-ts.
A. C. AVERY,
Sol. for Respondents.

Endorsed: Filed in this office, April 21, 1899. Sam'l L. Trogdon, clerk.

Agreement of Counsel as to Assignment of Errors, Record, and Waiving Notice of Appeal.

UNITED STATES OF AMERICA,
Western District of North Carolina.

COLER AND COMPANY
vs.
THE BOARD OF COMMISSIONERS OF WILKES COUNTY and Others.

In this cause it is agreed that in the assignment of errors counsel for the defendants may treat the opinion of the court in Union Bank of

Richmond *vs.* The Commissioners of Oxford as the opinion in this case, and may assume in addition that the court will hold both the original charter of the Northwestern Railroad Company, and Code of North Carolina, sections 1996 to 2000, inclusive, as authority sufficient to empower the commissioners of Wilkes to create the bonded debt in controversy.

118 It is further agreed that the complainants, counsel waives all notice of appeal.

It is further agreed that both parties may use the copies of affidavits filed as exhibit to the answer as well as affidavits filed in this cause, and that a bond of five hundred dollars on appeal shall be sufficient and that the complainants may rely on the statutes filed as exhibits to the bill as evidence of what are the statutes of North Carolina.

A. C. AVERY,
For Defendants.
CHAS. PRICE,
Sol. for Complainants.

Endorsed: Filed in this office, April 13th, 1899. Sam'l L. Trogdon, clerk.

Final Decree.

United States Circuit Court, Western District of North Carolina, Greensboro, N. C., April 13th, 1899. In Equity.

W. N. COLER AND COMPANY, Complainants,
vs.
THE BOARD OF COMMISSIONERS OF WILKES CO. and Clarence Call, ex-Sheriff and *ex Officio* ex-Treasurer, and John H. Johnson, Sheriff and *ex Officio* Treasurer of Wilkes County, Respondents. } Final Decree.

This cause coming on to be heard upon the bill, answers, replications and former orders, exhibits and other evidence in the cause, and being debated by counsel, the court doth declare: that the bonds issued by the county of Wilkes in aid of the building of the Northwestern North Carolina railroad, mentioned in the bill, are valid obligations of the county of Wilkes, and were purchased by the complainants for value, and that they are the lawful holders of the same. The court doth further declare that the respondents, Clarence Call, ex-sheriff and *ex officio* ex-treasurer, and John H. Johnson, sheriff and *ex officio* treasurer of Wilkes county, are the lawful trustees of the said bondholders, and hold the sum of thirteen thousand

119 dollars, $13,000, mentioned in the bill, as such trustees, under and by virtue of the law and orders of the board of commissioners of Wilkes county, for the benefit of said bondholders, and for the sole purpose of paying off and discharging the interest due on the said bonds, as set out in the bill. And now it is therefore ordered and decreed that Kerr Craige be, and is, appointed a receiver for said sum of thirteen thousand dollars; and that the said Call and

Johnson, ex-treasurer and treasurer, as aforesaid, pay over to him forthwith the said sum or any such part of the same as may be in their hands, and that the said board of commissioners of Wilkes county are enjoined from in any manner interfering with the execution and performance of this decree. It is further ordered and decreed that the said receiver, Kerr Craige, enter into bond in the sum of twenty thousand dollars, the same to be approved by this court, for the faithful performance of the duties of his receivership.

It is further ordered and decreed that the said receiver hold the said sum of thirteen thousand dollars until the further order of this court.

It is further ordered and decreed that the clerk of this court certify this decree to the said receiver and to the respondents, to wit: the board of commissioners of Wilkes county, and the said ex-treasurer and treasurer, Call and Johnson.

THOS. R. PURNELL,
United States Dist. Judge, Presiding in the Circuit Court of the Western Dist. of N. C., by Designation of the Circuit Judge of This the 4th Circuit of the United States, and Sec. 906, R. S.

Endorsed: Filed in this office, Apr. 14th, 1899. Sam'l L. Trogdon, clerk.

120 *Petition for Appeal.*

Circuit Court of the United States, Western District of North Carolina, Fourth District. In Equity.

THE BOARD OF COMMISSIONERS OF WILKES County and J. H. Johnson, Sheriff and *ex Officio* Treasurer of Wilkes County, Appellants,
vs.
W. N. COLER AND COMPANY, Appellees.
} Petition on Appeal.

The above-named, The Board of Commissioners of Wilkes County and John H. Johnson, sheriff and *ex officio* treasurer, who were defendants in the suit begun by original bill by appellees above named, conceiving themselves aggrieved by the decree made and entered on the 13th day of April, A. D. 1899, in said cause, do hereby appeal from the said order and decree entered in favor of the appellees, above named, in the circuit court at Greensboro, by Hon. Thomas R. Purnell, judge presiding, on said 13th day of April, to the United States circuit court of appeals for the fourth circuit, and they pray that this appeal may be allowed, and that a transcript of the record of proceedings and papers upon which said order or decree is made, duly authenticated, may be sent to the circuit court of appeals of the fourth judicial circuit of the United States.

A. C. AVERY,
FINLEY & GREEN,
T. J. DULA,
Attorneys for Appellants.

Dated April 18th, 1899.

Order Allowing Appeal.

The foregoing claim of appeal is allowed.

THOM. R. PURNELL,
U. S. Judge, &c.

Endorsed: Filed in this office, May 2nd, 1899. Sam'l L. Trogdon, clerk.

121 *Assignment of Errors.*

The Circuit Court of the United States for the Western District of North Carolina, at Greensboro.

W. N. COLER, W. N. COLER, JR., BIRD S. Coler, James W. Campbell, and Francis Coler, Bankers, under the Name and Style of Coler and Company, Appellees,
vs.
THE BOARD OF COMMISSIONERS OF WILKES County, Clarence Call, ex-Sheriff and *ex Officio* ex-Treasurer of Wilkes County, and John H. Johnson, Treasurer of Wilkes County, Appellants.
} Assignment of Errors.

And, now, on the 30th day of June, A. D., 1899, came the said The Board of Commissioners of Wilkes County, and John H. Johnson, treasurer of Wilkes county, by A. C. Avery, Finley and Green, and T. J. Dula, their solicitors, and say, that the decree in said cause, entered at *at* Greensboro, on the 15th day of April, A. D., 1899, is erroneous and against the just rights of the said defendants, appellants, for the following reasons:

First. Because it appeared from the cases of Union Bank *vs.* The Board of Commissioners, 116 N. C., 339, Belo *vs.* Commissioners, 76 N. C. Rep., 489, and Hill *vs.* Commissioners, 67 N. C. R., 367, and Commissioners of Wilkes *vs.* Call, 123 N. C. R., 308, 322, 328, which were introduced, and from other evidence, that it had not been shown upon the trial of said cases of Union Bank *vs.* The Board of Commissioners, Belo *vs.* The Commissioners of Forsyth County, or Hill *vs.* The Commissioners of Forsyth County, or upon appeal in either of said causes, in the supreme court of North Carolina, that the statute enacted August 11th, 1868, which was attached to the complaint as an exhibit, had failed to pass both houses of the General Assembly of the State of North Carolina, in accordance with the requirements of the constitution of said State, art. 2, sec. 14, whereas it appeared on the hearing of this cause that the said amendment to the charter purporting to have been enacted on the 11th day of August, A. D., 1868, was no law, for the reason that it failed to pass both houses of said General Assembly, as required by said
122 section of said constitution, and because the court, in referring to the opinion in Union Bank of Richmond *vs.* The Board of

Commissioners of Oxford *et al.*, as embodying the reasons upon which the opinion of the court was founded erroneously held, in effect, that the commissioners of Wilkes county contracted to pay the bonds in question in contemplation of a decision of the supreme court of North Carolina recognizing the validity of said act of August 11th, 1868.

Second. Because the evidence showed that the contract held to be valid in said case of Belo *vs.* The Commissioners of Forsyth County, 76 N. C. Rep., 489, was entered into before the constitution of North Carolina, into which for the first time *was* incorporated the provisions of said sec. 14, art. 2, was ratified on the 24th of April, A. D., 1868, and when there was no such restrictive requirement in force as a part of the organic law of the State, and the court erred in following the ruling in said case of Union Bank of Oxford *vs.* The Board of Commissioners of Oxford *et al.*, as was declared by the court, in that the contract held to be valid by the supreme court of North Carolina in said case of Belo *vs.* The Commissioners of Forsyth County, was entered into, not in contemplation of the provisions of said section 14, art. 2, of the constitution of North Carolina but before said section became a part of the organic law of said State.

Third. Because the court erroneously held that the bonds in controversy were "valid obligations of the county of Wilkes," when it appeared in evidence that the defendants relied, as authority for issuing such bonds, upon the five statutory provisions attached as Exhibits A, B, C, D, E and G to the complaint, to wit:

1st. (Exhibit A.) An ord-nance of the constitutional convention of 1868, incorporating the Northwestern North Carolina Railroad Company, ratified March 9th, 1868, the authority thereby conferred on the counties (if any power was delegated) having been revoked by the ratification of the constitution of North Carolina on the 22nd to the 24th of April, 1868, incorporating for the first time the provisions of article 7, section 7, and of article 5, sections 1, 5, 6 and 7, and the bonds having been issued (see Exhibit E) on October 1st, 1889.

2nd. (Exhibit B.) An act of the legislature ratifying and confirming the said charter, enacted August 11th, 1868, which, as appeared in the evidence, failed to pass both houses of the General Assembly, as required by the constitution, art. 2, section 14,
123 ratified April 22nd to April 24th, 1868, prior to the passage of said art. 3rd, (Exhibit C) section 1996 of the Code of North Carolina, it appearing in evidence that the said section, as construed with sections 1999 and 2000 of said code, was insufficient as authority for issuing the bonds, under the construction placed on sections 1, 5, 6, 7 of article 5 of the constitution of North Carolina, prior to the issuing of said bonds, by the supreme court of said State, in the cases of Barksdale *vs.* Commissioners, 93 N. C. R., 472, 475, and Gallaway *vs.* Chatham Railroad Company, 63 N. C. R., 147, 155, 156, 158 (both of which opinions were relied upon on the hearing).

4th. (Exhibit D.) Section 1997 of the Code of North Carolina, it being shown to be a part of the same statute, as said sections 1996, 1999 and 2000, which construed together failed to confer authority to

create the bonded debt under the prior rulings in said cases of Barksdale *vs.* The Commissioners, and Gallaway *vs.* Commissioners.

5th. (Exhibit- E and G.) Chapter 43, Laws of 1879, ratified February 20th, 1879, and chapter 156, Laws of 1881, ratified March 2, 1881, it being shown in evidence that both said amendments of 1879 and of 1881 to the charters of said Northwestern North Carolina Railroad Company, failed to pass both houses of the General Assembly in accordance with the requirements of section 14, article 2 of the constitution of North Carolina.

Fourth. Because it appeared before the court on the hearing that the supreme court of North Carolina, in the case of The Commissioners of Wilkes County *vs.* Clarence Call and others, 123 N. C. R., 308, had held that the bonds in controversy were not valid for want of authority in said county to issue them, and that the said supreme court had previously, in the case of Bank *vs.* Commissioners, 119 N. C. R., 214; Commissioners *vs.* Snuggs, 121 N. C., 394; Rodman *vs.* Washington, 122 N. C. R., 39' and Commissioners *vs.* Payne, 123 N. C. R., 432, held other municipal bonds invalid, when the same questions were involved, and the court erroneously overruled said decisions instead of following the construction given by said supreme court to the constitution and statutes of said State, and erroneously assigned as a reason for said ruling that the same question had been previously adjudicated in the case of Union Bank *vs.* Commissioners of Oxford, 116 N. C. —, when the question whether the statute relied on as authority for issuing the municipal bonds had passed in accordance with the requirements of art. 2, sec 14, of the constitution of North Carolina had not been raised in said last-named case.

124 Fifth. Because the court erroneously overruled and failed to follow the ruling of the supreme court of North Carolina in the case of Commissioners *vs.* Call, 123 N. C., 308, erroneously holding that the decision in Broadnax *vs.* Groom, 64 N. C., 244, was a ruling in favor of the right to create such bonded indebtedness, and that after the contract creating the bonded debt in controversy was entered into in view of said decision, it was overruled by said decision in Commissioners *vs.* Call, as will appear from the opinion in Union Bank of Richmond *vs.* The Board of Commissioners of Oxford — Fed. Reports, referred to by the judge as giving the grounds of his ruling in the cause.

Sixth. Because it appeared on the hearing that the case of The Commissioners of Wilkes *vs.* Clarence Call, 123 N. C., 308, had been taken by writ of error to the Supreme Court of the United States, where it was held that the court had no jurisdiction to review a decision of the highest judicial tribunal of a State construing its constitution and laws, and because the courts of North Carolina had exclusive jurisdiction to hear and try actions brought by all holders of said bonds residing within said State, and in holding that non-resident holders of such bonds had any other or different remedy or right, the court did not extend to all holders of such bonds the equal protection of the law.

Seventh. Because the court held that the bonds in controversy

were "valid obligations" of Wilkes county, and referred to the reasoning in the decision in Union Bank of Richmond *vs.* The Board of Commissioners of Oxford, and thereby erroneously predicated the ruling that said bonds were valid upon the ground that the case of Carr *vs.* Coke, 116 N. C., 223, and Broadnax *vs.* Groom, 64 N. C., 224, 247, were previous decisions of the supreme court of North Carolina, in which the court, prior to the decision in Bank *vs.* Commissioners, 119 N. C., 214, had held that the courts could not look behind the signatures of the presiding officers of the two houses of the General Assembly, and examine the journals, as to any class of statutes, in passing upon the question whether they had been enacted in the mode prescribed by the constitution.

Eighth. Because the court erroneously held that the bonded debt created by the county of Wilkes was a valid debt or obligation, and that the board of commissioners of Wilkes county was authorized by law to create said debt, at the time when the bonds were issued, on October 1st, 1889, and erroneously referred in support of
125 said ruling, to the previous decision, in the circuit court of the eastern district of North Carolina, in the case of Union Bank of Richmond *vs.* The Board of Commissioners of Oxford, Fed. Rep., wherein a similar ruling was erroneously predicated in part upon the decision of the supreme court of North Carolina, in Gatlin *vs.* The Town of Tarboro (78 N. C., 119, 123).

Ninth. Because the ruling of the court that the bonds in controversy *was* erroneous, in that it was based upon the erroneous view of the law that "at the time these bonds were issued, the law of North Carolina, as construed by the courts of the State, was that the copy of the act, attested according to law by the presiding officers of the two houses of the legislature, and filed in the office of the secretary of state, is conclusive proof of the enactment and contents of the statutes of the State, and that such attested copy cannot be contradicted by the legislative journals or in any other way," whereas there was no decision of the said supreme court of North Carolina in force when said bonds were issued, which was inconsistent with the subsequent ruling of the said court, Union Bank of Richmond *vs.* Commissioners of Oxford, 119 N. C., 214, that statutes providing for the creation of a debt by a municipal corporation came within the mandatory provision of section 14, art. 2, of the constitution, and constitute one of the two exceptions to the general rule created by art. 2, sections 14 and 16.

Tenth. Because the court erred, in view of all the admitted or undisputed facts, appearing from the pleadings and proofs offered, in holding that the bonds in controversy and described in the pleadings were valid obligations of Wilkes county.

Wherefore the said defendants, appellants, The Board of Commissioners of Wilkes County and John H. Johnson, treasurer of Wilkes county, pray that the said decree be reversed, and that the said court may be directed to enter a decree in accordance with the prayer of the bill.

A. C AVERY,
FINLEY AND GREEN,
T. J. DULA,
Solicitors for Defendants, Appellants.

Appeal Bond and Approval.

Know all men by these presents that we, the Board of Commissioners of Wilkes County, and John H. Johnson, sheriff and *ex officio* treasurer, as principals, and R. A. Spainhour and A. M.
126 Church, as sureties, are held and firmly bound unto W. N. Coler and Company, appellees in an appeal to the circuit court of the United States for the fourth circuit, entitled The Board of Commissioners of Wilkes County, and John H. Johnson, sheriff and *ex officio* treasurer, appellants, against W. N. Coler and Company, appellees, in the just and full sum of five hundred dollars ($500), to be paid to the said W. N. Coler and Company, their attorneys, executors, administrators and assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seal, and dated this 22nd day of April, A. D., 1899.

Whereas, lately, at a circuit court of the United States for the western district of North Carolina, at Greensboro, in a suit depending in said court between W. N. Coler and Company, complainants, against the Board of Commissioners of Wilkes County, and John H. Johnson, sheriff and *ex officio* treasurer of Wilkes county, and another, defendants, a decree was rendered against the said, The Board of Commissioners of Wilkes County, and John H. Johnson, *ex officio* treasurer, defendants, and in favor of the said W. N. Coler and Company, complainants, and the said Board of Commissioners of Wilkes County, and John H. Johnson, sheriff and *ex officio* treasurer of Wilkes county, having obtained an appeal, and filed thereof in the clerk's office of the said circuit court, to reverse the decree in the aforesaid suit, a citation directed to the said W. N. Coler and Company, citing and admonishing them to be and appear at a United States circuit court of appeals for the fourth circuit, to be holden at Richmond, Virginia, on the first Tuesday in May, A. D., 1899, being the 2nd day of May, 1899.

Now, the condition of the above obligation is such that, if the said, The Board of Commissioners of Wilkes County, and John H. Johnson, sheriff and *ex officio* treasurer, shall prosecute said appeal with effect, and answer all damages and costs if they fail to make their plea and defense good, then the above obligation to be void; otherwise to remain in full force and virtue.

THE BOARD OF COMMISSIONERS
OF WILKES COUNTY,
By J. T. PEDEN, *Chairman.* [SEAL.]
L. C. JENNINGS. [SEAL.]
J. H. JOHNSON,
Sheriff and ex Officio Sreasurer. [SEAL.]
A. M. CHURCH. [SEAL.]
R. A. SPAINHOUR. [SEAL.]

127 NORTH CAROLINA, }
Wilkes County. }

Personally appeared before me this day R. A. Spainhour and A. M. Chruch, residents and freeholders of said county and State, who made oath that they — each worth the sum of $500 over and above all their indebtedness and homestead and personal property exemptions allowed by law. This the 22nd day of April, A. D., 1899.

L. BUMGAMER,
Clerk Superior Court.

Approved:
THOMAS R. PURNELL, *Judge.*

29th day of April, 1899.

Citation on Appeal.

United States Circuit Court of Appeals for the Fourth Circuit.

UNITED STATES OF AMERICA, }
Fourth Judicial Circuit, } *ss:*

To W. N. Coler and Company Greeting:

You are hereby cited and admonished to be, and, appear at a session of the United States circuit court of appeals, to be holden at the city of Richmond, in said circuit, on the 10th day of May, A. D. 1899, pursuant to an appeal from a decree of the circuit court of the United States for the western district of North Carolina, fourth circuit, rendered at Greensboro on the 13th day of April, A. D. 1899, in your favor in a cause depending in said court wherein W. N. Coler and Company are complainants and The Board of Commissioners of Wilkes County and John H. Johnson, sheriff and *ex officio* treasurer, and another, are defendants, named in the original bill, to show cause, if any there be, why the decree rendered against the said defendants in said cause above named (appellants here) should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of our Supreme Court, this the — day of April, in the year of our Lord one thousand eight hundred and ninety-nine.

THOS. R. PURNELL,
U. S. Judge, &c.

128 I accept service of the forgoing citation on appeal having agreed to allow further time till July 1st, 1899, to perfect a case on appeal. This the 14th day of April, 1899.

CHAS. PRICE,
Solicitor for Appellees.

Filed in this office May, 6th 1899.

SAM. L. TROGDON, *Clerk.*

Order to Transmit Record.

UNITED STATES OF AMERICA, }
Western District of No. Ca. }

In the Circuit Court, Fourth Circuit, at Greensboro.

And thereupon, it is ordered by the court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereto relating, be transmitted to the said circuit court of appeals for the fourth circuit; and the same is transmitted accordingly.

Teste:

SAM'L L. TROGDON, *Clerk.*

Clerk's Certificate.

I, S. L. Trogdon, clerk of the circuit court of the United States for the western district of North Carolina, at Greensboro, in said district, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of W. N. Coler and others, bankers, under the name and style of W. N. Coler & Co. *vs.* The Board of Commissioners of Wilkes County and others, as fully as appears from the original papers and records in this office.

Seal of the Court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at office in city of Greensboro, in said district, on this the 29th day of June, A. D. 1899.

SAM'L L. TROGDON,
Clerk of the said Circuit Court.

129 *Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit.*

BOARD OF COMMISSIONERS OF Wilkes County *et al.*, Appellants,
vs.
W. N. COLER & COMPANY, Appellees.

No. 319. Appeal from the Circuit Court of the United States for the Western District of North Carolina, Greensboro.

June 30, 1899. Transcript of record filed, and cause docketed.
Same day. Appearance of A. C. Avery for the appellants, order filed.
July 3, 1899. Appearance of Charles Price for the appellees, order filed.
July 19, 1899. Twenty copies of printed record filed.

Notice of Appellants to be Allowed to File Affidavits.

Filed Oct. 16, 1899.

130 UNITED STATES OF AMERICA, }
Western District of North Carolina. }

Circuit Court of Appeals, Fourth Circuit.

COLER AND COMPANY }
versus }
THE BOARD OF COMMISSIONERS OF WILKES COUNTY ET AL. }

Notice.

To Honorable Charles Price, counsel for Coler & Company, appellees:

You will take notice that the appellants will move before the circuit court of appeals of the fourth district at Richmond on the 16th day of November, 1899, to be allowed to file with the record, and to constitute a part of the same, the affidavits of Thomas S. Kenan, Joseph L. Seawell and A. C. Avery, copies of which affidavits are attached to this notice.

A. C. AVERY,
Attorney for The Board of Commissioners of Wilkes County and C. C. Wright, Appellants.

I acknowledge service of the foregoing notice together with copies of the affidavits of T. S. Kenan, J. L. Seawell and A. C. Avery, attached thereto by delivery of copies of said notice and affidavits to me this the 14th day of October A. D. 1899, original being shown to me.

CHAS. PRICE,
Solicitor for Coler and Company, Appellees.

131 *Affidavits of Thomas S. Kenan, Joseph L. Seawell, and A. C. Avery.*

Filed Oct. 16, 1899.

132 UNITED STATES OF AMERICA:

Circuit Court of Appeals, Fourth Circuit.

COLER AND COMPANY
versus
THE BOARD OF COMMISSIONERS OF WILKES COUNTY ET AL.

Affidavits Offered by Appellants.

133 UNITED STATES OF AMERICA:

Circuit Court of Appeals, Fourth Circuit.

COLER AND COMPANY
versus
THE BOARD OF COMMISSIONERS OF WILKES COUNTY ET AL.

RALEIGH, NORTH CAROLINA.

Thomas S. Kenan, being duly sworn, on this the 12th day of October, 1899, deposes and says:

1. That he is now, and was, when the case of Commissioners of Wilkes *et al. v.* Clarence Call *et al.* was carried by writ of error to the Supreme Court of the United States from the supreme court of North Carolina, clerk of the last-named court, and caused the making up of the transcript of the record sent up in obedience to the writ of error.

2. That under the rule of the supreme court of North Carolina, the justice who writes the opinion delivers the manuscript to the clerk, who is required to have five typewritten copies made, and to furnish one to each of the justices, and that the rule was followed in this case.

3. That it is the practice for the justice who writes the opinion to make such corrections in the typewritten copy as he may deem requisite, before the same is filed as the decision of the court, and that Justice Douglas did make corrections in the typewritten copy furnished him in this case, and among them is one on page 20 of the opinion, in which the following words are stricken out with a pencil, but leaving the same still legible, to wit: "That the railroad does not touch the county of Wilkes and;" that copies of the same were sent to the official State reporter and to the West Publishing Company and to the Supreme Court of the United
134 States, and that any mistake which may have occurred in verifying any one of said copies with the original is due to an oversight of the affiant or his deputy in correcting all of the four copies so as to make them conform to the one furnished Justice

Douglas and filed as the original opinion; and that the affiant does not remember whether the verification in this particular case was made by himself or his deputy.

THOS. S. KENAN.

Sworn to and subscribed before me, day and year first above written. Witness my hand and official seal.

R. C. LAWRENCE,
Notary Public.

[SEAL.]

Joseph L. Seawell, being duly sworn, deposes and says: That he is employed as deputy clerk and typewriter by the said Thomas S. Kenan, who makes the foregoing affidavit; that he has read the same and that the facts therein stated are true.

JOS. L. SEAWELL.

Sworn to and subscribed before me, day and year first above written. Witness my hand and official seal.

R. C. LAWRENCE,
Notary Public.

[SEAL.]

135 UNITED STATES OF AMERICA,
Western District of North Carolina.

Circuit Court of Appeals, Fourth Circuit.

COLER AND COMPANY
versus
THE BOARD OF COMMISSIONERS OF WILKES COUNTY ET AL.

A. C. Avery being duly sworn, deposes and says:

1. That he was attorney for the plaintiffs in the action entitled Board of Commissioners of Wilkes County *et al. v.* Clarence Call *et al.* in the superior court of Wilkes county, North Carolina, where it was brought, in the supreme court of North Carolina, and in the Supreme Court of the United States, where the cause was taken up by writ of error.

2. That in making up his brief for the Supreme Court of the United States, the affiant cited the opinion as published in the South Eastern Reporter, volume 31, page 481, and it having never occurred to affiant that any mistake had been made in the transcript sent up, the affiant read the other portions of the record sent up, but did not read the opinion of Justice Douglas as printed in the record, and was astonished when he *made* the attack made upon him in the argument of this cause in the circuit court at Greensboro.

3. That, though unable to communicate with Justice Douglas or the clerk of the supreme court of North Carolina in time to offer their affidavits on the hearing in said circuit court, the affiant, being familiar with the rule as to copying and correcting opinions of the justices of the supreme court of North Carolina, suggested as
136 a probable explanation of the cause of the error what is now shown to have been the truth by the affidavits of the clerk and his deputy.

4. That the affiant would have asked for a statement on oath from Justice Douglas, but for the fact that he is not on duty or in the State of North Carolina, but in a sanatarium, or under treatment in the city of Philadelphia, Pa.

A. C. AVERY.

Sworn to and subscribed before me this the 12th day of October, 1899, as witness my hand and seal of office.

[SEAL.] R. C. LAWRENCE,
Notary Public.

137 *Certified Questions or Propositions of Law Certified to the Supreme Court of the United States.*

Filed Nov. 17, 1899.

Upon the hearing on the circuit, the decree, as above set out, was entered in favor of the complainants, whereupon, the suit was taken by appeal to this, the circuit court of appeals for the fourth circuit, before the undersigned, and said court desiring for its proper decision the instruction of the Supreme Court of the United States concerning certain questions or propositions of law arising in said suit:

Now therefore, we the undersigned, do hereby certify said questions or propositions of law to the Supreme Court of the United States for instruction as aforesaid:

First. Whether, upon the averments of the bill of complaint, answers, replications, orders, exhibits, and other evidence, and matters and things recited herein, the circuit court of the United States, was bound in passing upon this case by the decisions of the supreme court of North Carolina in the following cases:

Commissioners of Wilkes County *vs.* Clarence Call *et al.*, 123 North Carolina Report 308;
Bank *vs.* Commissioners, 119 N. C. Rep. 214;
Commissioners *vs.* Snuggs, 121 N. C. Rep. 394;
Radman *vs.* Washington, 122 N. C. Rep. 39;
Commissioners *vs.* Payne, 123 N. C. Rep. 432;

considering in connection with prior decisions of said court, and the following provisions of the constitution of said State:

Article 2, sections 14 and 16, and article 5, section- 1, 4, 6 and 7, and article 7, section 7.

Second. Whether, if the bonds and coupons in question, were issued, put in circulation and came to the hands of com-
138 plainants, appellees, in due course of trade, for valuable consideration, and without notice, and if there were at that time no decision of the supreme court of North Carolina adverse to these bonds or identical bonds, issued under similar statutes, the bonds held by complainants are valid bonds.

Third. Whether there was any decision adverse to the validity of these bonds or identical bonds or any construction of the consti-

tution or law of North Carolina which affected the question of their validity when they came in due course of trade and for valuable consideration and without notice, other than such notice as the parties are assumed to have of existing provisions in the constitution and statutes of the State, of their invalidity.]

As witness our hands this 17th day of November, A. D. 1899.

CHARLES H. SIMONTON,
Circuit Judge Presiding, Fourth Circuit.
JOHN PAUL,
District Judge, Western District of Virginia.
WM. H. BRAWLEY,
District Judge, District of South Carolina.

(MEM.—The record of the pleadings, decree &c. incorporated into said certificate is omitted from this record by agreement of counsel, which is hereafter inserted.)

139 Dec. 12, 1899.—Certified copy of the certificate transmitted to the Supreme Court of the United States.

Mandate of the Supreme Court of the United States.

Filed May 13, 1901.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fourth circuit, Greeting:

[Seal of the Supreme Court.]

Whereas, lately in the United States circuit court of appeals for the fourth circuit, in a cause between The Board of Commissioners of Wilkes County *et al.*, appellants, and W. N. Coler & Company, appellees, wherein certain questions arose which were certified under the seal of the said circuit court of appeals to the Supreme Court of the United States for its opinion, as by the inspection of the certificate of the judges of the said United States circuit court of appeals, which was brought into the Supreme Court of the United States agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred, the said cause came on to be heard before the said Supreme Court, on the said certificate,
140 and was argued by counsel.

On consideration whereof, it is the opinion of this court that the circuit court of the United States should have regarded the decisions of the supreme court of North Carolina in Bank *v.* Commissioners; Commissioners *v.* Snuggs; Rodman *v.* Washington; Commissioners of Wilkes County *v.* Call; and Commissioners *v.* Payne, referred to in the first certified question, as controlling upon the inquiry whether the legislative enactments of 1868, 1879, and 1881

were passed in such manner as to become, under the Constitution, laws of the State.

2. That the rights of the parties in this case are determinable by the law of the State as it was declared by the State court to be at the time the bonds here involved were made in the name of the county and put upon the market.

Whereupon, it is now here ordered by this court that it be so certified to the said United States circuit court of appeals.

MARCH 18, 1901.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion of this court as according to right and justice, and the laws of the United States, ought to be had, the said certificate notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 19th day of April, in the year of our Lord one thousand nine hundred and one.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

141 May 15, 1901 (May term 1901), cause came on to be heard and was argued by counsel and submitted.

Feb. 4, 1902 (February term 1902), the court announced and filed its opinion, which is as follows, to wit:

Opinion.

Filed Feb. 4, 1902.

142 United States Circuit Court of Appeals, Fourth Circuit.

THE BOARD OF COMMISSIONERS OF Wilkes County *et al.*, Appellants, *vs.* W. N. COLER & COMPANY, Appellees.	No. 319. Appeal from the Circuit Court of the United States for the Western District of North Carolina, at Greensboro.

(Argued May 15, 1901; decided Feb. 4, 1902.)

Before Goff, circuit judge, Morris and Boyd, district judges.

A. C. Avery and James E. Shepherd for the appellants, and Charles Price (John F. Dillon, Harry Hubbard and John M. Dillon on brief) for the appellees.

MORRIS, *District Judge:*

This is a suit to determine the validity of certain bonds issued by Wilkes county, North Carolina, in aid of the construction of the Second division of the railroad constructed by the Northwestern North Carolina Railroad Company, incorporated in 1868; the Second division being from the towns of Winston and Salem, up

the valley of the Yadkin, by way of Jonesville and Wilkesboro, in the county of Wilkes, to Patterson's factory, in the county of Caldwell.

143 After hearing argument in this appeal at the November term, 1899, this court certified to the Supreme Court of the United States three questions: first, whether this court was controlled in dealing with the case by certain decisions of the supreme court of North Carolina in connection with article 2, sections 14 and 16, and article 5, sections 1, 4, 6 and 7, and article 7, section 7, of the constitution of North Carolina, adopted April 24, 1868. Second, whether, if there was no decision of the supreme court of North Carolina adverse to the validity of the bonds at the time when the appellees acquired them for a valuable consideration, without notice, they were valid in the hands of the appellees. Third, whether when the appellees acquired the bonds any decision then announced by the supreme court of North Carolina was adverse to the validity of the bonds which affected them in the hands of the appellees.

The bonds were dated October 21, 1889, and each one contained the following recital: "This bond is one of a series of one hundred issued by authority of an act of the General Assembly of North Carolina ratified on the 20th day of February, A. D. 1879, entitled 'An act to amend the charter of the Northwestern North Carolina railroad for the construction of a Second division from the towns of Winston and Salem, in Forsyth county, up the Yadkin valley, by Wilkesboro, to Patterson's factory, Caldwell county,' and authorized by a vote of the majority of the qualified voters of Wilkes county, by an election regularly held for that purpose, on the 6th day of November, A. D. 1889, and by an order of the board of commissioners of Wilkes county, made on the first day of April, A. D. 1889. This series of bonds is issued to pay the subscription of one hundred thousand dollars, made to the capital stock of the Northwestern North Carolina Railroad Company by said county of Wilkes."

Article 2, section 14 of the constitution of North Carolina, adopted April 24, 1868, provided that no law should be passed authorizing a county to raise money on its credit, or impose a tax, unless the bill for the purpose was read three several times in each house of the General Assembly and passed three several readings on different days in each house, and unless the yeas and nays on the second and third reading of the bill were entered on the journals.

144 The supreme court of North Carolina in Commissioners of Wilkes County *vs.* Call, 123 N. C., 308; Bank *vs.* Commissioners, 119 N. C., 214; Commissioners *vs.* Snuggs, 121 N. C., 374; Rodman *vs.* Washington, 122 N. C., 39; Commissioners *vs.* Payne, 123 N. C., 432, all cases involving the validity of county bonds, has held that the provisions of the constitution of North Carolina requiring the entry of the yeas and nays on the journals was imperative, and the failure of such entry was absolutely fatal to the validity of the legislation, so far as it undertook to authorize the county to issue bonds in aid of a railroad.

In Commissioners of Wilkes County *vs.* Call (1898) the validity of the bonds of the issue now in suit was called in question, and the supreme court of North Carolina declared that the act of February 20, 1879, under which these bonds are recited to have been issued, was never legally passed so as to become a law giving authority to issue the bonds, for the reason that the yeas and nays were not entered upon the journals. To the questions certified by this court the Supreme Court of the United States gave the most thorough consideration and held, Mr. Justice Harlan speaking for the court (Wilkes County *vs.* Coler, 180 U. S., 506), that the circuit court was bound by the decisions of the supreme court of North Carolina construing their own State constitution and holding that the legislative enactments of 1868, 1879, and 1881, were not validly enacted so as to give Wilkes county power to issue these bonds. But the Supreme Court of the United States further ruled that notwithstanding the invalidity of the act of February 20, 1879, the *bona fide* holders of the bonds might look to any valid legislation giving power to issue them, and that whether or *or* not there was such power was to be determined by the law of North Carolina, as declared by the supreme court at the time the bonds were put upon the market.

Mr. Justice Harlan, speaking for the court, said: "But the Belo case involved other considerations. Forsyth county—whose liability on the bonds in suit in that case was directly involved—made the point that it had no authority to issue such bonds. The court, however, held that such authority was conferred by the convention ordinance of March 9, 1868, and the subscription and bonds made in the name of that county to the Northwestern North Caro-
145 lina Railroad Company were upheld as valid under that ordinance, which was recognized as part of the law of the State and as conferring authority on the county of Forsyth, to do what it did. It results that when the bonds here in question were issued in 1889, it was the law of North Carolina that the ordinance of 1868, constituting the charter of the Northwestern North Carolina Railroad Company, was not superseded by the constitution of 1868, but was in force, and, therefore, gave power to the counties embraced by its provisions to take stock in that company and pay for it in county bonds just as Forsyth county had done."

Mr. Justice Harlan then calls attention (page 531) to the rule that as in 1877 in the Belo case the supreme court of North Carolina had recognized the power of the counties embraced within the provisions of the convention ordinance of 1868 to issue bonds to pay for stock in this same railroad when the power was exercised by a county under the restrictions imposed by the constitution of 1868, that is to say, "not unless by a vote of a majority of the qualified voters therein" that no subsequent decision of the supreme court of North Carolina made after county bonds had been put upon the market could alter vested rights by holding that the constitution of 1868 abrogated the power given by the convention ordinance and that no subscription in aid of a railroad could be made except by virtue of a new statute passed in conformity to the requirements of section 14 of article 2, and thus invalidate bonds issued before the rendering of

such a decision. The Supreme Court of the United States, while recognizing that the Belo and Hill cases had held that the convention ordinance of 1868 gave power to the counties embraced within its terms to issue bonds such as those now in suit, declined to consider under the questions certified by this court whether Wilkes county was embraced within the general powers of that ordinance, and suggested the following as some of the various questions which might arise in considering whether Wilkes county had the power under that ordinance, unassisted by any of the subsequent enactments, to issue the bonds sued on in the present case, viz.:

"Did the general power given by that ordinance to the North-
western North Carolina Railroad Company to construct a
146 railroad from its eastern terminus 'running by way of Salem
and Winston, in Forsyth county, to some points in the north-
western boundary line of the State to be hereafter determined'
invest Wilkes county with authority to subscribe to the stock of the company and to issue bonds in payment of such subscription? Was Wilkes county in the same category with Forsyth county? Was the route of the road northwest of Salem and Winston to some point in the northwestern boundary line of the State to be determined by the legislature or by the company? If by the legislature, was that route ever determined otherwise than by the act of 1879 which has been adjudged never to have become a law of the State? Did Wilkes county have authority, under the ordinance of 1868 alone, to aid by a subscription of stock and bonds the construction of the Second division of the road referred to in the act of 1879, extending from the towns of Winston and Salem up the valley of the Yadkin by way of Jonesville and Wilkesboro, in the county of Wilkes, to Patterson's factory, in the county of Caldwell?" The Supreme Court said: "These are matters about which we do not feel disposed to express an opinion under the very general and indefinite questions certified from the circuit court of appeals. Nor do we deem it proper to express any opinion as to the scope and the effect upon the rights of the parties of sections 1996, 1997, 1998, and 1999 of the Code of North Carolina."

The recitals of the bonds in suit are as follows:

1. That the bond is issued by authority of an act of the General Assembly of North Carolina ratified the 20th day of February, A. D. 1879. This act being an invalid enactment and not a law, so far as it undertakes to give power to issue bonds, this recital does not preclude enquiry as to whether or not there was such a law and the existence of legislative authority.

Northern Bank *vs.* Porter Township, 110 U. S., 608.

But the recital of an invalid act does *does* not preclude enquiry as to whether there was in existence any other valid legislative authority under which power to issue the bond, could be upheld.

Wilkes County *vs.* Coler, 180 U. S., 506–524.
Anderson County *vs.* Beal, 113 U. S., 227.
Commissioners *vs.* January, 94 U. S., 202.
Evansville *vs.* Dennett, 161 U. S., 434, 443–444.
Knox County *vs.* Ninth National Bank, 147 U. S., 91.

147 2. The second clause of the recital is to the effect that the bond is authorized by a vote of the majority of the qualified voters of Wilkes county by an election regularly held for that purpose on the 6th day of November, A. D. 1889, and by an order of the board of commissioners of Wilkes county, made on the first day of April, A. D. 1899. This is a recital of facts which it was for the board of commissioners of Wilkes county to ascertain and decide, and which, therefore, the county is estopped from denying as against a *bona fide* holder.

Anderson County *vs.* Beal, 113 U. S., 227–229.
Gunnison County *vs.* Rollins, 173 U. S., 255.

3. The bond further recites, that "This series of bonds is issued to pay the subscription of $100,000 made to the capital stock of the Northwestern North Carolina Railroad Company by said county of Wilkes."

This recital is in the same way conclusive of the facts therein stated.

The question now to be passed upon, therefore, is whether, independent of the invalid legislative enactments attempted to be passed subsequent to the convention ordinance of March 9, 1868, Wilkes county had the power under that ordinance to submit the stock subscription to the vote of the qualified voters, and upon authorization by a majority of the votes to issue the bonds and levy taxes to pay the interest and principal. If Wilkes county was in the same category with Forsyth county, the supreme court of North Carolina adjudged in the case of Belo *vs.* Commissioners, 76 N. C., 489 (1877), that the power was conferred by the ordinance of the convention, and this ruling remained undisturbed by any subsequent adjudication of the supreme court of North Carolina, and until after these bonds were issued.

The power thus held to be sufficient to authorize Forsyth county to subscribe to the stock of this railroad and issue bonds in payment is to be found in the following sections of the ordinance to incorporate the Northwestern North Carolina Railroad Company, ratified March 9, 1868.

148 "SECTION 1. That for the purpose of constructing a railroad of one or more tracks from some point on the North Carolina railroad between the town of Greensboro, in Guilford county, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the State, to be hereafter determined, a company is hereby incorporated under the name and style of the Northwestern North Carolina Railroad Company, &c., &c."

"SECTION 2. Be it further enacted That the capital stock of said company may be created by subscriptions on the part of individuals, corporations and counties in shares of one hundred dollars."

SECTION 5 provides that the president and directors shall proceed to locate the eastern terminus of the road and proceed at once to construct said road in five-mile sections to the towns of Winston and

Salem, in Forsyth county, which portion of the railroad when completed "shall constitute its First division."

SECTIONS 8 and 9 provide that the State should loan its bonds to the railroad company as each five miles is graded and ready for its superstructure to the amount of $10,000 per mile upon the security of a first mortgage of the entire road and its property.

SECTION 12 is as follows:

"Be it further ordained That the stockholders of said company may pay the stock subscribed by them either in money, labor or materials for constructing said road as the board of directors may determine, and that all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company, for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company."

"SECTION 13. Be it further enacted That the company shall have the power to construct branches of said road, one of which
149 shall run from the towns of Winston and Salem, by way of Mount Airy, in Surry county, to the line of the State of Virginia."

Section 33 of the charter of the North Carolina and Atlantic Railroad Company passed in 1852, chapter 136, is as follows:

"SECTION 33. Be it further enacted That it shall be lawful for any incorporated town or county near or through which said railroad may pass to subscribe for such an amount of stock in said company as they shall be authorized to do by the inhabitants of said town or the citizens of said county in manner and form as hereafter provided."

SECTIONS 34, 35, 36 and 37 provide the manner in which the vote of the qualified voters of the counties shall be taken and, if a majority of the qualified vote-s voting upon the question are in favor of the subscription, provide how the subscription shall be made and that the county shall negotiate a loan or loans and shall levy taxes to pay the principal and interest.

It will be seen by reading the sections of the charter of the North Carolina and Atlantic railroad into the charter of the Northwestern North Carolina railroad, as required by its section 12, that every county near or through which the railroad may pass is authorized to subscribe for its stock to an amount authorized by a majority of the qualified voters of the county and to issue bonds in payment and to levy taxes to pay the principal and interest. The first question, therefore, now is, was the railroad which was constructed into Wilkes county by the Northwestern North Carolina Railroad Company a part of the railroad authorized to be built by its charter? If it was, then it would seem that the powers conferred by the charter operated to validate the action of Wilkes county just as the same powers in the same charter were held by the supreme court of North Carolina in Belo *v.* Commissioners, to have done in the case of Forsyth county.

The convention ordinance authorizes counties to subscribe to the

stock of the railroad company and it provides that all counties subscribing shall do so in the manner and under the same rules, regulations and restrictions set forth in the charter of 1852, chapter 136.

The only restriction in that charter which is drawn in question is the provision that the subscription shall be by counties near or through which the railroad may pass. The railroad, in aid of which the bonds in suit were issued, does pass through Wilkes county.

It appears to us that it is the same railroad authorized by the convention ordinance. That ordinance authorizes a railroad running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the State to be thereafter determined, and contemplated and provided for its being built by divisions, and enacted that the portion to Salem and Winston should constitute its First division. The piece of railroad for which the bonds in suit were issued does run from Salem and Winston in the general direction of the northwestern boundary line of the State, and, indeed, it seems evident that such a railroad to some point in the northwestern boundary line of the State must pass near or through Wilkes county. The act of February 20, 1879, which is recited in the bonds as the authority for issuing them, definitely located this road running into Wilkes county. It does it by enacting that section 13 of the convention ordinance shall be amended by adding certain words which make it read, when so amended as follows:

SEC. 13. Be it further ordained That the company shall have power to construct branches of said road, one of which shall run from the towns of Winston and Salem by way of Mount Airy, in Surry county, to the line of the State of Virginia (amendment)," and one of which shall be constructed from the town of Winston and Salem, up the valley of the Yadkin by way of Jonesville and Wilkesboro, in the county of Wilkes, to Patterson's factory, in the county of Caldwell, which branch shall be known as Second division.

Section 2 of the act of February 20, 1879, provides for convict labor being furnished for the purpose of constructing this Second division; and section 4 provides for bond subscriptions by any county in the State. This act was invalid so far as it attempted to give power to the counties to create a debt, because it was not passed as laws for that purpose are required by the constitution of North Caro-
151 lina to be passed, but that invalidity does not affect the sections of the law which deal with other matters.

Rodman *vs.* Washington, 122 N. C., 39–42.
Russell *vs.* Ayres, 120 N. C., 180–189.
Gamble *vs.* McCrady, 75 N. C., 509.
Bank *vs.* Commissioners, 119 N. C., 214.

So far as now appears, the amendment locating the road into Wilkes county was validly passed and became a valid law of North Carolina.

If section 13 had been originally enacted as it now reads as amended, it would seem clear that as when built this piece of road

was declared to be the Second division of said road, and as power was given to all counties "near or through which said railroad may pass" to subscribe for stock, that Wilkes county would be in the same category with Forsyth county, which is mentioned in the section locating the First division. Wilkes would be one of the counties through which the Second division of the road was authorized to be constructed, just as Forsyth was a county into which the First division of the road was to be built.

Has the supreme court of North Carolina ever interpreted this amendment and declared its meaning? We do not find that it has. In Commissioners *vs.* Call, the majority opinion does not place the decision upon the contention that Wilkes county is not in the same category with Forsyth county, but upon a want of power affecting both alike and upon the fact that an invalid enactment is recited on the face of the Wilkes County bonds as authority to issue them.

The original charter ordinance of 1868, having given authority to construct a railroad by way of Salem and Winston, in Forsyth county, to some point on the northwestern boundary line of the State, and to construct branches, and the legislature having afterwards validly enacted that one of these branches running towards the northwestern boundary line of the State, to be called the Second division, should be constru-ed by way of Wilkes county, there would seem no sound reason for construing the legislation so as to deny to Wilkes county that power to issue bonds which the supreme court of North Carolina had in 1877 held that Forsyth county had.

It is urged in argument that the policy of North Carolina
152 was declared by the constitution of 1868 to be hostile to permitting counties to bond themselves in order to subscribe to railroads which passed near or through them.

We do not think this anywhere appears.

The constitution does not, as it might easily have done, if such had been the policy of its framers, declare that no county should have the power to create a debt for such a purpose; it merely provided that new laws for that purpose should be enacted with a special formality tending to insure their careful consideration by the legislature. The only inhibition which the constitution enacts against counties is by article VII, sec. 7, which is that no county shall loan its credit unless by a vote of the majority of the qualified voters, and the constitutional convention itself passed the charter of the Northwestern North Carolina railroad with the power to the counties near or through which it should pass to issue bonds for subscription to its stock, and the constitution did not inhibit the execution of any powers previously given to counties to make subscriptions to railroad stock and issue bonds therefor. 180 U. S. 531.

Nor does section 1996 of the Code of North Carolina prescribing that counties shall have power to subscribe to aid in the completion of railroads in which their citizens may have an interest, nor the many enactments of the State legislature conferring upon counties the power to aid railroads indicate such a policy, but rather a contrary one.

We think that Wilkes county when the bonds in suit were issued

was in the same category with Forsyth county and that the purchasers of the bonds had a right to rely and rest upon the decisions in the cases of Hill *vs.* Commissioners, 67 N. C. 367 (1870), and Belo *vs.* Commissioners, 76 N. C. 489 (1877), as to the power conferred by the ordinance of March 9, 1868, and that the different conclusion as to the power conferred by that ordinance arrived at and declared by a majority of the supreme court of North Carolina, long after the date of the issuing of the bonds in suit, cannot destroy the validity of the bonds in the hands of *bona fide* holders.

Loeb *vs.* Columbia Township, 179 U. S. 472–492.

It is, of course, with great reluctance that we feel constrained to differ from the conclusion arrived at by the supreme court of
153 North Carolina as announced in the majority opinion in Commissioners *vs.* Call (1898), and it may be that the difference would not have arisen had the contentions in support of the validity of the bonds been as fully presented in that case in behalf of holders as deeply interested in them as they have since been in the Supreme Court of the United States and in this court in the litigation over their validity.

Having reached the conclusions herein expressed, it does not appear necessary to consider the effect of sections 1996, 1997, 1998 and 1999 of the Code of North Carolina giving power to counties to aid in the completion *in* railroads in which the citizens of the county have an interest.

The majority of the judges sitting in this appeal are of opinion that the decree of the circuit court should be affirmed.

BOYD, district judge, concurring:

In concurring with Judge Morris in his opinion in this case, I desire to say: This cause was argued upon the whole record, it being on appeal from a decree entered in the circuit court for the western district of North Carolina at Greensboro, April 14th, 1899, by Judge Purnell, designated to preside in that district by the circuit judge. The rights of the parties are to be determined upon the whole record, including the answers by the Supreme Court to the certified questions. The decision is reported in 180 U. S., page 506. The answers to the questions certified are, in substance, as follows:

1. That the circuit court should have regarded the decisions set out in the questions as controlling upon the inquiry whether the legislative enactments of 1868, 1879 and 1881 were passed in such manner as to become, under the constitution, laws of the State.

2. That the rights of the parties in this case are determinable by the law of the State as it was declared by the State court to be at the time the bonds here involved were made in the name of the county and put upon the market.

The questions certified by this court to the Supreme Court involved the validity of an issue of bonds in the sum of one hundred thou-

sand dollars by the county of Wilkes, in the State of North
154 Carolina, in the year 1889, in payment of its subscription in this sum to the capital stock of the Northwestern North Carolina Railroad Company, a corporation constructing and owning a railroad running from Greensboro via Winston-Salem, in Forsyth county, to Wilkesboro, in Wilkes county.

The power relied on by the complainants in the bill for the issue of the bonds was the ordinance of 1868, the charter of the company, and an act of assembly of the 11th of August, 1868, the sections 1996, 1997, &c., of the Code of North Carolina, an act of assembly of 20th of February, 1879, and an act of March 2nd, 1881, all referred to in paragraph 21 of the bill, page 7, of the record, &c.

After the issue of these bonds, in due course of trade, there came into the hands of complainants fifty-five of the same of the denomination of one thousand dollars each.

The purchase of the same was for value, the highest market price, in good faith, and without notice, express or implied, that there was any suggestion of their being void, invalid, fraudulent or otherwise than legal bonds in their issue and sale.

It is alleged that the interest on these bonds was paid regularly for eight years by the county, and that such payment was enjoined by a judgment of the superior court of Wilkes county, affirmed by the supreme court, rendered in an action by the Board of Commissioners of the County *vs.* The Treasurer, one Call, who, as such, held in his hands a fund for that purpose.

It is alleged in the bill that this railroad runs over twenty miles in the county of Wilkes, and is the only railroad in that county.

It is contended upon the part of the appellants that the decision of the supreme court of North Carolina, in the action above set out should be followed by the circuit court. The Supreme Court, in answering the questions certified, disposed of that contention. Therefore, I will not discuss it further than I have already in the Stanly case, No. 290, at this term.

By reference to the decision of the Supreme Court, it is to be noted one thing decided was that the ordinance of 1868 was valid, and was in force after the constitution was adopted; and, further, that the supreme court of North Carolina had so held in the cases of
155 Hill *vs.* Coms. of Forsyth County, 67 N. C. R., 367 (June term, 1870), and in Belo *vs.* Coms. of Forsyth County, 76 N. C. R., 489 (Aug. term, 1877).

Further, it was held expressly that the Belo case decided the ordinance of 1868, March 9th, conferred the power upon Forsyth county to make the subscription made by the county, and that this was so independently of any other legislation.

As to Wilkes county, the court states the question to be as follows: "Whether Wilkes county was so situated with reference to the contemplated road that it could be said to have had the same authority as was given to Forsyth county."

Mr. Justice Harlan, delivering the opinion of the court says: "Was Wilkes county in the same category as Forsyth County?"

In short, if Wilkes county was in the same category with Forsyth

county, then it stands decided by the Supreme Court of the United States, that the ordinance of 1868, did give to Wilkes county the authority to issue the bonds in question, irrespective of the legislation of 1868, 1879, and 1881, so that the only question now is, whether Wilkes county was in the same category with Forsyth county. If so, the answer of the Supreme Court to the second question applies, which is that the rights of the parties in the Wilkes County case, this case, are determinable by the law of the State, as it was decided by the State court to be at the time when the Wilkes County bonds were put upon the market. It results, therefore, that if Wilkes county was in the same category with Forsyth county, the question is conclusively decided in favor of the validity of the bonds by the Supreme Court of the United States without anything more, and the circuit court of appeals should affirm the judgment of the circuit court in this case.

The supreme court of North Carolina, in Commissioners *vs.* Call, 123 N. C., 308 (p. 317), 1898, undertakes to distinguish the case of Belo *vs.* Commissioners, 76 N. C., 289, as follows: "We have not overlooked the fact that in Belo *vs.* Commissioners, 76 N. C., 489, this court strongly intimates that section 12 of the charter did confer the authority given in section 33 of the act of 1852." (Section 2 of the ordinance of the constitutional convention gave the
156 power, and section 12 prescribed the manner of its exercise.) "but it does so incidentally and with little discussion, because it was not denied in the pleadings. This was not the determining point in the case, which turned chiefly upon the recitals in the bonds and the ratifying act of 1868. This is clearly shown in the opinion itself, which devotes four pages to the discussion of equitable estoppel arising on the recitals, and about half a page to the possible binding effect of the ordinance, winding up with the significant sentence on page 497, that 'as the case is presented to us, that question does not arise and we do not decide it.' It evidently did not receive careful investigation, as it apparently did not arise in the pleadings. The court stated that the 'principle of equitable estoppel is a most important element in the transaction,' and that the recitals in the bonds (which were essentially different from those now before us) constituted an estoppel *in pais* upon the county of Forsyth."

There can be no estoppel by recitals in bonds in the absence of absolute legislative authority, power, to issue the same.

The whole discussion of the supreme court of North Carolina in Belo *vs.* Commissioners, which, as stated by the court in the case of Commissioners *vs.* Call, occupied four pages, proceeded upon the only possible ground—that there was legislative authority in the ordinance of 1868; but that perhaps that authority had not been strictly followed. The question which the court on page 497 says "does not arise" is this question stated in the very words of the opinion of the court, in Belo *vs.* Commissioners, to wit: "When the subscription was voted there is authority and reason for asserting that the justices could have been compelled, by process of law, to make the subscription, unless in defence they could have shown

that the election was not fairly conducted, but was influenced by the fraud of the railroad company (People *vs.* Supervisors, 27 Cal., 655). As the case is presented to us, that question does not arise and we do not decide it."

On the question of whether there was power to issue the bonds, the court said distinctly: "The county was clothed with the power to issue them, and it is admitted, that a majority vote sanctioned the subscription of stock, and the issue of the bonds."

Again, the court said: "It has been one purpose of
157 this opinion to show that the bonds were valid in the hands of *bona fide* holders without the aid of this healing act" (that is the act of August 11, 1868), the only other authority, being the said ordinance.

The case of Belo *vs.* Commissioners was decided in 1877, many years before the issue of these bonds, and, as before said, is the great leading case, upon this subject, in North Carolina.

This decision, and the impression it made upon the Supreme Court of the United States, as shown by the importance attached to it by Justice Harlan, has left but little for this court to decide.

As said by Bynum, justice, the author of the Belo decision—opinion—there was but one purpose he had in mind—to show the ordinance of the convention of 1868, the original charter of the company, gave the power to Forsyth county to issue the bonds, and was not, and did not, become ineffective upon the ratification of the constitution.

No recital in any bond ever did confer power to issue it. There must, in every case, first, be shown a power to issue, after which the recitals may be relied on by an innocent purchaser as assurance of the proper exercise of the power, and of the performance of the conditions precedent to the issue by the corporate authorities, putting the bond upon the market.

This rule, this principle, is axiomatic, universal, and has no exception.

Judge Morris has shown clearly that Wilkes county was in the same category with Forsyth county, the only question left open by the Supreme Court of the United States. The importance, however, of the interests involved demands that I should add something to what he has said upon this question. In the case of Bank *vs.* Coms., 119 N. C. R., 214, the act is expressly held valid as a charter, and for all purposes except as a taxing act. For that purpose it was void, because not passed as required by the constitution.

See section 1 of the act of 1879, directing that the road should run "up the valley of the Yadkin, by way of Jonesville and Wilkesboro, in the county of Wilkes," etc., is valid, and an amendment to the charter, the ordinance of 1868.

158 This puts Wilkes county in the same category as Forsyth county, in the sense suggested by Justice Harlan.

The route of the road was determined by the legislature; and by the company also.

Justice Harlan was not advertant to the fact that the act of 1879

was only adjudged void as a taxing act by the court, not for all purposes, but for this purpose only.

In the case of Bank *vs.* Commissioners, 119 N. C. R., 214, the act is expressly declared valid as a railroad charter, because the certification cannot be impeached by the journals; but void as a taxing act, because, for that purpose, under the constitution, it can be impeached by the same journals.

It is well settled in all courts that an act may be unconstitutional in part and constitutional in other respects. So section 1 of the act of 1879 is valid, because passed in all respects and certified as required by the constitution. See act of 1879, and especially section 5 &c., &c., where, upon its face, it is shown to have been read three times and ratified. The case of Bank *vs.* Commissioners, 119 N. C. R., 214, is decisive of this, being directly in point and, indeed, is the case out of which all this litigation has sprung. And, further, if the route was not a proper one, it was acquiesced in by the county when the company could have been forced, by mandamus, to have selected the proper one; or it could have been enjoined anyhow from constructing the road on the route determined upon if not the proper one.

Rodman *vs.* Washington, 122 N. C., 39, 42. Russell *vs.* Nyres, 120 N. C., 180–189. Gamble *vs.* McCrady, 75 N. C., 509. All cited by Judge Morris.

So it appears the route was determined by the legislature, by the company, and, at last, acquiesced in by the county.

I say by the company, because this legislation—that is to say, the ordinance—conferred the power upon the county of Forsyth and a privilege upon the company. Wilkes county is in the same category with Forsyth, so far as these powers are concerned, and it was one of the privileges of the company conferred also to determine the route of the road.

159 These powers are not only conferred upon the counties, but are privileges of the company, the Northwestern North Carolina Railroad Corporation. It follows, therefore, that Wilkes county was in "the same category" with Forsyth county.

The route of the road was determined by both the legislature and the corporation. This was one of the privileges conferred upon the company. And, besides, as before said, it is not for the county of Wilkes, which participated in the determination of the route, to be heard to say, in a suit by an innocent bondholder, years after it was determined, there was no power to do it.

In the case of The County of Scotland *vs.* Thomas, 94 U. S. R., on page 689, Justice Bradley says: "The specific question in the present case, therefore, is whether the authority given the counties and towns, in 1847, to subscribe to the capital stock of the Alexandria and Bloomfield R. R. Co. has become extinguished by the subsequent consolidation of that company with other companies, —spective of the constitutional provisions referred to."

Justice Bradley says, also, on page 688, after quoting the words of the constitution of Missouri, similar to the words of the North Caro-

lina constitution of 1868, that "This prohibition, it will be observed, is against the legislature's authorizing municipal subscriptions or aid to private corporations, it does not purport to take away any authority already granted."

On page 693, Justice Bradley goes on to say: "But the case has other aspects which it is necessary to take into consideration. * * * The project of the railroad promises a great public improvement, conducive to the interests of Alexandria and the counties through which it would pass. The power was sought at the hands of the legislature and was given." It was relied on by those who subscribed their private funds to the enterprise.

Speaking of this power, he says: "Why it should not still attach to this portion of the road as one of the rights and privileges belonging to it, into whose hands soever it comes, by consolidation or otherwise, it is difficult to see. * * * Subscription to the stock was not only a power of the county, but a privilege of the company."

I have not discussed the sections of the code in this con-
160 nection, because I do not consider it necessary, having already done so in the Stanly case at this term, before referred to.

The Supreme Court, in answer to the certified questions, has narrowed the issues between the parties to a small compass in this case.

It is clear that the two counties, Forsyth and Wilkes, were in the same category, as I say, in the sense expressed by Justice Harlan. Having determined that, our duty seems to me plain. The decree entered upon the circuit should, in my opinion, be affirmed.

GOFF, circuit judge, dissenting:

I dissent from the opinion of the court, as well as from the judgment entered in this case.

161 Feb. 8, 1902 (same term), the court made and entered the following decree, to wit:

Decree.

Filed Feb. 8, 1902.

United States Circuit Court of Appeals, Fourth Circuit.

BOARD OF COMMISSIONERS OF WILKES COUNTY ET AL., Appellants,
vs.
W. N. COLER & COMPANY, Appellees. } No. 319.

Appeal from the circuit court of the United States for the western district of North Carolina.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the western district of North Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and

decreed by this court, that the decree of the said circuit court, in this cause, be, and the same is hereby, affirmed with costs.

Feb. 8th, 1902. NATHAN GOFF.

162 *Stipulation of Counsel.*

Filed Feb. 19, 1902.

United States Circuit Court of Appeals, Fourth Circuit.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY ET AL., Appellants,
vs.
W. N. COLER & COMPANY, Appellees.

Whereas the counsel for appellants in the above-entitled cause propose to file a petition, on behalf of appellants therein, to the Supreme Court of the United States for a writ of certiorari, in order to have the decision of the circuit court of appeals for the fourth circuit reviewed, and,

Whereas, the record in said cause which was certified to said Supreme Court, apart from the three certified questions or propositions of law, signed by the judges of said circuit court (and which appear on page 48 of the original of said certificate or on page 42 of the certified record as printed), the said certified record is made up of extracts from the record sent up to said circuit court of appeals from the circuit court of the western district of North Carolina, at Greensboro.

Now therefore, the undersigned counsel respectively for the appellants and the appellees in said cause, in said circuit court of appeals for the fourth circuit, do hereby agree, that the said certified record, except the said certified questions, may be omitted from the record accompanying the petition and presented under the rule in such cases; and that if the Supreme Court under the rules shall require said portion of said record to be certified, it may be subsequently certified from the said circuit court of appeals and presented separately.

163 This agreement is based upon the fact that said certified record contains nothing that will not be found in the original record sent up from said circuit court.

This the 17 day of February, 1902.

A. C. AVERY,
Counsel for Appellants.
CHAS. PRICE,
Counsel for Appellees.

Feb. 19, 1902.—Mandate of this court is stayed pending petition for certiorari in the Supreme Court of the United States.

Clerk's Certificate.

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein-entitled cause as the same remains upon the records and files of the said circuit court of appeals, excepting the pleadings, decree &c. accompanying the certified questions or propositions of law to the Supreme Court of the United States which are, omitted by agreement of counsel.

Seal United States Circuit Court of Appeals, Fourth Circuit.

In testimony whereof I hereto set my hand and affix the seal of the said United States circuit court of appeals for the fourth circuit, at Richmond this 19th day of February, A. D. 1902.

HENRY T. MELONEY,
Clerk U. S. Cir. Court of Appeals, 4th Ct.

164 UNITED STATES OF AMERICA, *ss:*

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit, do make return of the annexed writ of certiorari issued out of the Supreme Court of the United States in the cause therein entitled on the 14th day of March, 1903, by annexing hereto a certified copy of the stipulation of the attorneys of record that the certified transcript of the record on file in the Supreme Court of the United States in the said cause shall be taken and considered a proper return to the said writ of certiorari.

In testimony whereof I hereunto set my hand and affix the seal of the said circuit court of appeals, at Richmond on this 30th day of March, A. D., 1903.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, 4th Circuit.

165 UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fourth Circuit.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY ET AL., Appellants,
vs.
W. N. COLER & COMPANY, Appellees. } No. 319.

We, A. C. Avery, solicitor for the appellants, and Charles Price, solicitor for the appellees, in the above-entitled cause, do hereby stipulate and agree that the certified transcript of the record, on file in the Supreme Court of the United States, of said cause shall be taken and considered a proper return to the writ of certiorari issued by said Supreme Court on the 14th day of March A. D. 1903, directed to the circuit court of appeals of the fourth circuit, and commanding said court to send without delay, to said Supreme Court the record and proceeding in said cause.

A. C. AVERY,
Counsel for Appellants.
CHARLES PRICE,
JOHN F. DILLON &
HENRY HUBBARD,
Of Counsell for Appellees (W. N. Coler & Co.).

UNITED STATES OF AMERICA:

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit, do certify that the aforegoing
166 stipulation of counsel is a true copy of the original filed March 30, 1903, and now remaining among the records and proceedings in the therein-entitled cause.

In testimony whereof I hereto set my hand and affix the seal of the said circuit court of appeals, at Richmond, on this 30th day of March A. D. 1903.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, 4th Circuit.

167 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fourth circuit, Greeting:

Being informed that there is now pending before you a suit in which The Board of Commissioners of Wilkes County and John H. Johnson, sheriff, and *ex officio* treasurer, are appellants, and W. N. Coler & Company, are appellees, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the western district of North Carolina, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme
168 Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 14th day of March, in the year of our Lord one thousand nine hundred and three.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

169 [Endorsed:] File No. 18,411. Supreme Court of the United States. No. 247, October term, 1902. The Board of Commissioners of Wilkes County *et al. vs.* W. N. Coler & Co. Writ of certiorari and return. The execution of the within writ of certiorari appears by certain schedules hereunto annexed. Henry T. Meloney, cl'k U. S. cir. court of appeals, 4th circuit. March 30, 1903. Filed Mar. 31, 1903.

27358

No. ~~—~~ 247

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1901.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND JOHN H. JOHNSTON, SHERIFF AND EX-OFFICIO CHAIRMAN OF WILKES COUNTY, PETITIONERS,

against

W. N. COLER & CO., RESPONDENTS.

To the Honorable Charles Price,
Counsel for Respondents:

You are hereby notified that on this 19th day of May, 1902, or if the Court should not then be in session, then on Monday, June 16, A. D. 1902, a motion will be made before the Honorable Supreme Court of the United States upon the petition, record and briefs, copies of which are attached as a part of this notice, for a writ of *certiorari* to be issued out of and under the seal of said Court, directed to the United States Court of Appeals for the Fourth Circuit, commanding said Court of Appeals to certify and send to said Supreme Court of the United States on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of said Court of Appeals in this case entitled in said Court of Appeals "*The Board of Commissioners of Wilkes County et al., Appellants, against W. N. Coler & Co., Appellees, No. 319,*" to the end that

said cause may be reviewed, determined and adjudicated by the said Supreme Court of the United States, as provided in section 5 of the Act of Congress, entitled "An act to establish Circuit Courts of Appeal and to define and to regulate in certain cases the jurisdiction of the Circuit Courts of the United States, and for other purposes," approved March 3, 1891.

A. C. AVERY,
Counsel for Petitioners.

EDWARDS & BROUGHTON, PRINTERS AND BINDERS, RALEIGH.

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